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83-1187

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

ITT LIGHTING FIXTURES, INC. DIVISION OF ITT CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does noncoercive pro-union activity by minor supervisors during a representation campaign constitute an adequate ground for overturning the result of an election conducted by the National Labor Relations Board.?

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The petitioner, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit herein are reported at 712 F.2d 40 and 658 F.2d 934 and are reproduced in the separately bound appendix ("App.") at pp. 1a-9a and 10a-30a respectively. The decisions of the National Labor Relations

Board herein are reported at 265 NLRB No. 188, 252 NLRB 328 and 249 NLRB 449 and are reproduced at App. 31a-50a, 51a-62a and 63a-68a respectively.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 18, 1983. App. 1a. The Union's timely petition for rehearing *en banc* was denied on September 20, 1983. App. 69a-70a. On December 12, 1983, Justice Marshall entered an order extending the time to file a petition for a writ of certiorari to and including January 18, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The International Union, UAW, filed a petition with Region 26 of the National Labor Relations Board for a representation election among the employees working at ITT Lighting Fixtures Inc.'s facilities in Southaven, Mississippi, and in Memphis, Tennessee. The election was conducted on February 16, 1979, and the UAW was chosen by a majority of the employees to be the bargaining representative (UAW—175 votes, No Union—153 votes, challenged ballots—34). See App. 63a.

The votes of thirty-one group leaders were challenged by ITT on the ground that the group leaders were "supervisors" within the meaning of § 2(11) of the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, rather than "employees" within the meaning of § 2(3) of the Act, and ITT objected to the election results on the ground that the group leaders' pro-union activity impermissibly interfered with the employees' free choice. (The same group leaders had voted in two prior NLRB elections without challenge and were listed as employees on the list of eligible voters submitted to the Board by ITT in those elections. The Company's President testified in this case, moreover, that the group leaders' duties had not been changed in the interim.) See App. 63a-64a.

An NLRB hearing officer recommended that ITT's challenges to the eligibility of the thirty-one group leaders should be sustained, but that ITT's objections to the election should be overruled. The hearing officer concluded that these individuals were supervisors but that they had only very limited supervisory authority and that their participation in the Union's campaign was therefore insufficient to taint the election. Then the NLRB's Regional Director sustained ITT's challenges to only eleven of the thirty-one group leaders, ruling with respect to the remaining twenty that the evidence of supervisory status was either insufficient or contradictory. The Director concluded further that no decision need be made on the remaining twenty challenges because those ballots could not affect the outcome of the election. The Director further adopted the hearing officer's findings that, assuming their supervisory status, the group leaders were "minor" supervisors—*viz.*, supervisors who do not have the authority in the interest of their employees to hire, fire, suspend, lay-off, recall, promote, discharge, reward or discipline employees on their own volition—and that their involvement in the representation campaign in this case did not constitute objectionable conduct warranting the setting aside of the election results. The Director therefore certified the UAW as the employees' representative. See App. 64a-65a.

The Board granted ITT's request for review of the Regional Director's decision only insofar as that decision did not settle the status of twenty of the group leaders. In its decision on review, the Board found that four group leaders, in addition to the eleven leaders already found by the Director to be supervisors, should be so classified. The Board left unresolved the supervisory status of the remaining group leaders in light of the closeness of the question and the lack of effect of determining their status on the outcome of the election. The Board further found that, even assuming that all the group leaders were statutory supervisors, the leaders had

not engaged in any conduct that would warrant setting aside the election. The Board, therefore, certified the Union. See App. 65a-68a.

ITT continued to refuse to bargain with the UAW and the Union responded by filing unfair labor charges alleging that ITT was violating §§ 8(a)(5)&(1) of the NLRA by failing to recognize and bargain with the duly certified representative of the Company's employees. The Board concluded that ITT had engaged in an unlawful refusal to bargain. App. 56a-60a. ITT sought review of the Board's decisions before the United States Court of Appeals for the Second Circuit, and the Board cross-petitioned for enforcement. The Second Circuit refused to enforce the Board's order and remanded the matter to the Board for further findings on the supervisory status of the group leaders and on whether their pro-union activity unlawfully affected the votes of the employees. App. 22a-30a.

After reviewing the entire record in the underlying representation proceedings, as well as the UAW's and ITT's statements of position, the Board on remand reaffirmed its certification of the Union. App. 32a. In its supplemental decision, the Board examined the job functions and authority of each of the fifteen group leaders who engaged in pro-union activity. (The parties stipulated that sixteen of the thirty-one group leaders in question did not engage in any union activity, and, therefore, they were not the subject of inquiry on remand.) After its examination, the Board found that thirteen of the fifteen group leaders who engaged in union activity during the organizing effort were supervisors. With reference to these thirteen group leaders, the Board concluded:

> All thirteen of these individuals exercised independent judgment in assigning and directing work; seven had the authority to allow employees to leave work early and to approve overtime; and four could ad-

> just grievances. None of these group leaders had the authority effectively to recommend hiring, firing, promotions or written warnings. The most they could do was orally reprimand an employee and inform a foreman that an employee had committed an infraction or need to improve his job performance. As mentioned above, these oral warnings were not recorded. [App. 48a.]

The Board did *not* find that any of the thirteen group leaders had engaged in any coercive or otherwise unlawful conduct toward eligible voters. Instead, *some* of the thirteen group leaders were found to have engaged in one or more of the following types of pro-union conduct:

1) serving on the in-plant organizing committee;

2) urging others to vote for the UAW;

3) soliciting UAW authorization cards;

4) attending UAW meetings;

5) wearing UAW shirts and insignia.

See App. 37a-48a.

The Board concluded that in light of the group leaders' limited authority there was no "warrant [for] finding that the retaliatory potential of the group leaders was sufficient to make their involvement in the union campaign coercive to employees" and affirmed its "earlier holding that the pro-union statements of the group leaders did not reasonably tend to coerce employees and impair the employees' freedom of choice so as to justify setting the election aside." App. 49a.

Again, ITT sought review of the Board's decision before the United States Court of Appeals for the Second Circuit, the Board cross-petitioned for enforcement, and the UAW intervened as a party. And again the Second Circuit reversed the Board. That court stated that "The question is whether * * * the 15 group leaders whose status as supervisors is conceded * * * might have affected the result because of the nature of their authority and

the extent of their union activity." App. 8a. The totality of its basis for answering that question "yes" is the following:

> The testimony shows that Massey, McNeely, Millington and Barry Williams supervised a total of 31 employees and possessed more than minimal authority to reward employees. They encouraged employees to support their pro-union position. • • •
>
> Joan Carson was a groupleader of 20 employees. She had authority to select employees for overtime. • • • Carson could issue oral warnings. Her supervisor said he would issue a written warning on her recommendation, but would first check the employee's file to see if Carson had issued an oral warning. • • •
>
> On this record it has been shown that 51 employees could possibly have been influenced by the pro-union activity of five of the groupleaders. Thus, we cannot say that the election was held in an atmosphere "free not only from interference, restraint, coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice." *ITT Lighting Fixtures*, 658 F.2d at 936, quoting *Sewell Manufacturing Company*, 138 N.L.R.B. 66, 70 (1963). [App. 8a-9a.]

REASONS FOR GRANTING THE WRIT

1. There is a clear conflict between the circuits on the standard for determining whether noncoercive pro-union activity by supervisors during a representation campaign is a basis for setting aside a National Labor Relations Board election. This is a recurring question, as the number of courts of appeals which have spoken to the issue since 1980 demonstrates. See pp. 7-11 *infra*. Moreover, the question is of unusual practical importance in the administration of the National Labor Relations Act because that Act does not draw a bright line between "employees" and "minor supervisors." See p. 11 *infra*. Un-

der the decision below, individuals who have campaigned for the union in a noncoercive manner, and in the evident belief that they are "employees" whom the Act encourages to take an active part in representation campaigns, invalidate an election in which the union has prevailed if it is determined after lengthy litigation that, even though it was not so understood at the time, those individuals are minor supervisors.

The present case aptly illustrates the mischief the Second Circuit's rule creates. ITT has successfully contested the election on the basis of noncoercive activities, no diflerent from those engaged in by any union supporter, of individuals whom the employer had treated as "employees" in two prior elections. In any such election if individuals on the borderline between "employee" and "supervisor" simply encourage a significant number of their fellows to support the union, and if the employer shows that those indiivduals are "minor supervisors," the result, under the Second Circuit rule, is that, without more, the election is set aside.

2. The Second Circuit held in this case that an NLRB representation election is invalid if pro-union activity—which does not encompass express or tacit threats or promises of benefit—of minor supervisors "could possibly have * * * influenced" employees whose votes were sufficient to affect the outcome of the election. App. 9a. This ruling conflicts with the decisions in several other circuits.

The prevailing rule is that stated by the First Circuit:

> It is clear that certain supervisors favored the Union, and that employees knew this; but without evidence of any threats, express or implied, this does not compel a finding of coercion. * * * Here there were no significant evidence of threats, and none that any employee feared retaliation; those employees who were asked about such fears stated that they

> had none. [*Fall River Sav. Bank v. N.L.R.B.*, 649 F.2d 50, 57 (C.A. 1, 1981), footnotes omitted.] [1]

See also, N.L.R.B. v. Northeastern University, 707 F.2d 15, 18 (C.A. 1, 1983) (contrasting the First Circuit's position with that of the Second Circuit as expressed in its initial opinion in this case.)

The Fifth Circuit law is in accord with that of the First Circuit. In *N.L.R.B. v. Klingler Elec. Corp.*, 656 F.2d 76, 86 (C.A. 5, 1981), that court reaffirmed its prior decisions which held that:

> [P]ro-union activities by supervisors are merely an expression of personal preference and are not enough, by themselves, to invalidate an election. *NLRB v. Alamo Express, Inc.*, 430 F.2d 1032, 1035 (5th Cir., 1970), *cert. denied*, 400 U.S. 1021, 91 S.Ct. 584, 27 L.Ed.2d 633 (1971). Klinger must show that the activities created an environment of tension or coercion such as to preclude employees from exercising a free choice. * * * *Singleton Packing*, 418 F.2d at 281 (quoting *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir., 1965.)

So, too, in *N.L.R.B. v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (C.A. 5, 1980), *cert. denied*, 449 U.S. 844 (1980), that court stated:

> This Circuit has clearly held that not just any advocacy of a union by a supervisor rise to the level of [objectionable] supervisory pressure or coercion. The mere statement of personal preference by a supervisor is not coercive. * * * There is no supervisory taint so long as nothing in the words, deeds, or atmosphere of a supervisor's [pro-union communica-

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[1] The First Circuit contrasted the Fourth Circuit decision in *Turner's Express v. NLRB*, 456 F.2d 289 (C.A. 4, 1972) where the foremen warned employees that they would "get tough" if the union lost, and that anti-union employees would "pay for it." See pp. 9-10, *infra*.

> tion] contains the seeds of potential reprisal, punishment or intimidation.[2]

Likewise, the Tenth Circuit has held: "Supervisory involvement in an election campaign is not per se a reason to invalidate an election." *Worley Mills, Inc. v. N.L.R.B.*, 685 F.2d 362, 365 (C.A. 10, 1982):

> Such pro-union activities are no more than an expression of personal preference. Standing alone they do not taint an otherwise valid election. *NLRB v. Alamo Express, Inc.*, 430 F.2d 1032, 1035 (5th Cir., 1970), *cert. denied*, 400 U.S. 1021, 91 S.Ct. 584, 27 L.Ed. 633 (1971). Where supervisors exhibit pro-union activity and employees are aware of this, the election will be tainted only upon a showing of threats, either expressed or implied, that result in the employees' fear of retaliation. *Fall River Savings Bank v. NLRB*, 649 F.2d 50, 57 (1st Cir., 1981). There must have been created an environment of tension which precluded employees from exercising free choice at the polls. *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir., 1965). See *NLRB v. Klingler Electric Corp.*, 656 F.2d 76, 86 (5th Cir., 1981). [685 F.2d at 365.]

While there is language in earlier Fourth Circuit decisions that would support the approach of the Second Circuit in this case, that court has more recently approved the Fifth Circuit rule as set out in *San Antonio Portland Cement Co., supra* (quoted above). In *Turner's Express, Inc. v. N.L.R.B., supra*, the Fourth Circuit, reversing the Board, set aside an election because two supervisors had been very active in support of the union. See 456 F.2d at 292.[3] But in *N.L.R.B. v.*

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[2] See also *Medical Center at Bowling Green v. N.L.R.B.*, 712 F.2d 1091, 1094 (C.A. 6, 1983); *N.L.R.B. v. Howard Johnson Motor Lodge*, 705 F.2d 932, 934 (C.A. 7, 1983); *N.L.R.B. v. Wehrenberg Theatres, Inc.*, 690 F.2d 159, 162 (C.A. 8, 1982).

[3] The Fourth Circuit majority said in *Turner's Express, Inc.*:

> The Board found that the activities of these supervisors were harmless because of the company's vigorous anti-union cam-

Manufacturer's Packing Co., Inc., 645 F.2d 223 (C.A. 4, 1981), the Fourth Circuit refused to "read *Turner's Express, Inc.* as establishing a per se rule invalidating a union election if there is any evidence of pro-union supervisory activity." *Id.* at 225-226. Instead, that court said that

> whether pro-union supervisory activity is sufficient to overturn an election depends on the facts and circumstances of each case. The critical inquiry is whether the supervisors' pro-union activities prevented employees from freely effectuating their collective choice. *Schneider Mills, Inc. v. NLRB*, 390 F.2d 375, 378 (4th Cir., 1968). Employees' free choice is stifled and an election may be set aside if the supervisors' activities "contain the seeds of potential reprisal, punishment or intimidation." *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir., 1980), citing *NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302, 1316 (5th Cir., 1973); *accord, Global Marine Development of California, Inc. v. NLRB*, 528 F.2d 92, 95 (9th Cir., 1975), *cert. denied*, 429 U.S. 821, 97 S.Ct. 70, 50 L.Ed.2d 83 (1976). The activities of the supervisors in *Turner's Express* were obviously egregious, and there is no doubt that they were pervasive, coercive, and upsetting to election conditions. [645 F.2d at 226.]

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paign and the employees' knowledge of the president's strong opposition to unionization. This is also answered by *Heck's, supra*, 386 F.2d at page 322:

> "It is no answer that the company's anti-union position was abundantly known to employees . . . An employee properly could doubt his ability to obtain protection by appeals to higher company authority."

In industry an employee is more concerned about the attitude of his immediate supervisor than he is with the feelings of the company president. This is similar to the Army where a private is more concerned with the attitude of his corporal or sergeant than he is with the colonel or general, since the corporal and sergeant control his day to day life. [456 F.2d at 292-293.]

See also N.L.R.B. v. St. Mary's Home, Inc., 690 F.2d 1062, 1069 n.13 (C.A. 4, 1982) (quoting the foregoing passage as "the controlling rule".)

3. This Court has recognized that the "statutory definition of the term 'supervisor' has been the subject of considerable litigation before the NLRB and in the federal courts." *Marine Engineers v. Interlake Co.*, 370 U.S. 173, 179 (1962). The Court there quoted with approval the First Circuit's observation that:

> ". . . the gradations of authority 'responsibility to direct' the work of others from that of general manager or other top executive to 'straw boss' are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor.' " [370 U.S. at 179, n.6, quoting *N.L.R.B. v. Swift & Co.*, 292 F.2d 561, 563 (C.A. 1, 1961).] [4]

Given the closeness of the line between employees and supervisors a colorable argument that one or more of the union's supporters should be classified as a supervisor will frequently be available to employers who are dissatisfied with the results of a representation election. Indeed, as the cases just discussed show, employers are quick to make that argument, which at the least provides the benefits of a delay in bargaining and thereby weakens the union that has prevailed in the election. The decision below by watering down the standard for overturning an election will encourage employers who wish to defeat a union organizing effort to litigate the question of supervisory status in hundreds of cases annually

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[4] See also *Iron Workers v. Perko*, 373 U.S. 701, 706 (1963) (question whether individual was supervisor "presents difficult problems of definition of status"); *N.L.R.B. v. Security Guard Services, Inc.*, 384 F.2d 143, 145 (C.A. 5, 1967) ("We have here for decision the aging but nevertheless persistently vexing problem of whether or not an employee is a supervisor.").

before the Board, and if that fails, before the courts of appeals.

4. Finally, the decision below both reveals and accentuates an unjustified and entirely unfair distinction between the rule on when pro-union supervisory activity is a basis for setting aside an election and the rule that an election will *not* be set aside on the basis of an employer's active noncoercive *anti-union* campaign, whether conducted by high management officials or by supervisors. See generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).[5]

The Board's election processes are designed to further employee freedom of choice rather than to favor or to disfavor a pro-union or an anti-union vote. The employees' freedom of choice may not be interfered with in either direction. Moreover, whether one accepts the Fourth Circuit's view that a supervisor would have greater impact on the employees whom he supervises than the company's president, or the Ninth Circuit's contrary view (see n.5 this page), it is indisputable that where the position on the desirability of union representation stated by top management and by supervisors coincides, the effect on the employees is greatest. Yet, although the law is that a noncoercive anti-union campaign conducted at all levels of the management hierarchy *is* permissible, the court below has set aside an election because of the noncoercive pro-union activities of five supervisors, in the course of

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[5] Indeed, the Ninth Circuit has reversed the Board for setting aside an election because of *threatening* statements "made by low-level, marginal supervisors." *Hecla Min. Co. v. N.L.R.B.*, 564 F.2d 309, 315 (C.A. 9, 1977). That court observed that "such statements are more likely to express individual views and less likely to influence the employee's decision than statements by high-level officials which bear the imprint of company policy." *Id.* This view is diametrically opposed to that of the Fourth Circuit in *Turner's Express*, quoted at pp. 9-10, n.3, *supra*.

a campaign in which employer representatives vigorously communicated their opposition to the union.[6]

This double standard of review of election objections, depending on whether the supervisor is supporting or opposing the union, is wholly at odds with the NLRA's guarantee of a freedom to choose union representation as well as a freedom not to do so.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] The court below observed in its first opinion that "the Company here waged a vigorous campaign against the Union * * *." App. 15a. Indeed, in a related case the Company was found guilty of unfair labor practices against pro-union employees. *ITT Lighting Fixtures*, 261 NLRB 229 (1982), enforced in part, reversed in part, 719 F.2d 851 (C.A. 6, 1983). Moreover, the employees here were repeatedly informed that ITT would overrule *any* adverse actions by pro-union supervisors. The ITT Employee Handbook stated "If you feel you are being pressured into making a commitment to the union, notify the Management and *we will see that such pressure is stopped.*" (Emphasis supplied) ITT gave similar assurances in several pieces of its campaign literature distributed during the organizing drive and in a captive audience session the day before the election.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 1248, 1361, Dockets 83-4002, 83-4020

ITT LIGHTING FIXTURES, DIVISION OF ITT CORPORATION,
Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)
Intervenor.

Argued April 26, 1983

Decided July 18, 1983

Arnold E. Perl, Memphis, Tenn. (Young & Perl, Memphis, Tenn., Richard M. Kobdish, Memphis, Tenn., on brief), for petitioner-cross-respondent.

Victoria Higman, Atty., N.L.R.B.., Washington, D.C. (Howard E. Perlstein, Atty., William A. Lubbers, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Associate Gen. Counsel and Elliott Moore, Deputy Associate Gen. Counsel, Washington, D.C., on brief), for respondent-cross-petitioner.

Eugene G. Eisner, New York City (Jordan Rossen, Gen. Counsel, M. Jay Whitman and Leonard R. Page, Associate Gen. Counsel, Detroit, Mich., on brief), for intervenor.

Before NEWMAN and PRATT, Circuit Judges, and METZNER, District Judge.*

METZNER, District Judge:

ITT Lighting Fixtures, Division of ITT Corporation ("Company") petitions the court to review and set aside a Decision and Order of the National Labor Relations Board ("Board") issued on December 16, 1982, finding the petitioner guilty of unfair labor practices and ordering it to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("Union"). The Board has cross-petitioned for enforcement of its order. The Union has intervened in support of the Board's petition.

This marks the second appearance of this case before this court. The court's prior decision is reported at 658 F.2d 934, and fully details the factual background. The court will assume familiarity with its prior decision and recount only the essentials.

I. *Prior Proceedings*

On December 14, 1978, the Union filed a representation petition with the Board seeking certification as the exclusive bargaining representatives of the Company's production, maintenance and warehouse employees. The Company challenged the inclusion of its groupleaders in the bargaining unit, claiming that they were supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(11).[1]

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* The Honorable Charles M. Metzner of the United States District Court for the Southern District of New York, sitting by designation.

[1] Section 2(11) of the Act, 29 U.S.C. § 152(11), defines "supervisor" as follows:

> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or

After a hearing, the Regional Director was unable to determine whether the groupleaders were supervisors, and permitted them to vote by challenged ballot.[2]

The election was held on February 16, 1979, and 362 ballots were cast. Of these 175 were cast for the Union, 153 were cast against the Union, and 34 were challenged and not counted. Thirty-one of these 34 ballots were cast by groupleaders.

A. *Before the Board*

The Company filed timely Objections to Conduct Affecting the Results of the Election, in which it charged that the groupleaders' open and pervasive pro-union activities tainted the election. After an evidentiary hearing the Hearing Officer sustained challenges to the ballots cast by the groupleaders, finding that they were all supervisors. However, he found that they were "minor" supervisors without real authority to affect the employment status of other employees and concluded that their pro-union activity did not taint the election.

The Regional Director reviewed the Hearing Officer's determination, and sustained the Company's challenges to only eleven of the groupleaders' ballots, finding the record inconclusive with respect to the authority of the other groupleaders. He found it unnecessary to determine the status of the remaining groupleaders because their votes would not have affected the outcome of the election. He disposed of the Company's charge that the groupleaders' pro-union activity tainted the election by concluding that,

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discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[2] The Board denied the Company's request that it review the Regional Director's failure to exclude the groupleaders.

"assuming arguendo," all 31 were supervisors, the groupleaders were "minor" supervisors without real authority to affect the employment status of other employees.

The Board granted review of the Regional Director's decision solely on the issue of whether the remaining groupleaders were supervisors. It found four additional groupleaders to be supervisors, and left unresolved the status of the remaining 16 because "their ballots cannot affect the election result. . . ." The Board adopted the remaining findings and conclusions of the Regional Director and certified the election.

The Company then refused to bargain with the Union. On September 26, 1980, the Board found the Company to be in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), and ordered the Company to bargain with the Union.

B. *Before This Court*

The case then came before this court on the Company's petition for review of the Board's order and the Board's cross-petition for enforcement. After reviewing the administrative proceedings in detail, the court concluded that the Board, and its designated finders of fact, had avoided the crucial issue: whether the pro-union statements and activities of many of the Company's groupleaders impaired the employees' freedom of choice in the election, and affected any of the 175 pro-union votes cast. *ITT Lighting Fixtures, Division of ITT Corporation v. NLRB*, 658 F.2d 934, 920 (2d Cir. 1981).

The court noted that such pro-union activity "involves the possibility that such conduct could coerce an employee into supporting the union out of fear of future retaliation. . . ." *Id.* at 937, quoting *Turner's Express, Inc.*, 189 N.L.R.B. 106, 107 (1971). The court read the Board's decisions to require, in the absence of direct threats of retaliation, consideration of two factors: (1) the degree

of supervisory authority, and (2) the extent, nature and openness of the pro-union activity.

The court pointed out that the Board had adopted the Regional Director's conclusion that the group leaders were "minor" supervisors without the authority to affect the employment status of other employees. There had been no analysis of the difference between "major" and "minor" supervisors and no explanation of what factors were considered in making the distinction. The Regional Director and the Board reached this conclusion about all the group-leaders, despite the fact that they found the evidence insufficient or inconclusive as to whether some of them were supervisors at all.

Thus, the court concluded it could not defer to the Board's ultimate judgment because it was not "supported by essential findings relative to two issues: first, whether, based upon the evidence and findings of fact reached thereon, the groupleaders or any of them who engaged in pro-union activity during the critical period were 'supervisors,' setting forth the criteria for such; and then, if so, whether their pro-union activity could effectively affect the votes of the employees." *Id.* at 940.

The court remanded the case to the Board for further fact-finding and analysis consistent with its opinion and the Board's decisions in the cases of *Delchamps, Inc.*, 210 N.L.R.B. 179 (1974), and *Flint Motor Inn Company, d/b/a Sheraton Motor Inn*, 194 N.L.R.B. 733 (1971). The question of law to be decided was whether the group-leaders' conduct reasonably tended to have a coercive effect on the employees so that it was likely to have impaired their freedom of choice in the election.

C. *The Board's Supplemental Decision*

The Board issued a Supplemental Decision and Order on December 16, 1982,[3] in which it concluded that:

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[3] The Board had originally directed that the record be reopened and a hearing held before an ALJ for additional findings of fact. Upon motion by the Company the Board rescinded the order re-

> "[T]here was no danger that a prounion group leader bent on retaliation could accomplish that end. . . . The type of day-to-day supervisory authority possessed by these group leaders simply did not afford the opportunity for effective retaliation against anti-union employees. . . . Accordingly, we affirm our earlier holding that the prounion statements and activities of the group leaders did not reasonably tend to coerce employees and impair the employees' freedom of choice so as to justify setting the election aside."

The Board found this result to be consistent with its decisions in *Delchamps*, *supra*, and *Flint Motor Inn*, *supra*, because the respective supervisors in those cases exercised "major" supervisory authority, such as the authority to hire and discipline.

II. *Discussion*

At the outset it should be noted that, contrary to the Board's statement, this court on the prior review did not approve an automatic conclusion that a supervisor's conduct might or might not affect voting based on a distinction between "major" and "minor" supervisory authority. The court said at 941:

> "None of these cases [cited by the Hearing Officer] are helpful in shedding light on the meaning of the major supervisor/minor supervisor distinction."

The court was not interested in what labels were used. It wanted to know the criteria developed by the Board for determining whether a supervisor was "major" or "minor," and whether the exercise of a supervisor's authority could have an impact on the laboratory condition for vot-

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opening the record, agreeing that the existing record was sufficient. *See ITT Lighting Fixtures, Division of ITT Corporation v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)*, 265 N.L.R.B. 188 (1982).

ing. The determination cannot be made, as the Board has done, simply by labeling a supervisor as "minor"; instead there must be consideration of both the extent of the supervisor's authority and the extent of his pro-union activity.

The Board is further in error when it states that the law of this case is "that a groupleader is a major supervisor only if he possesses the authority to hire, fire, promote, or issue written warnings on his own volition, or has the authority effectively to recommend such action." Nowhere in this court's prior opinion was such a ruling made.

The statute defines "supervisor" as one having authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). The Board's position is that the distinction between "major" and "minor" is based on the power to recommend *adverse* action because only that power gives the supervisor the retaliatory potential "sufficient to make their extensive involvement in a union campaign coercive upon employees."

It seems clear that in addition to the Board's criteria, which are based solely on the power to retaliate, there should be included the power to reward. This power consists of giving one employee an advantage over another. The authority to grant rewards in the form of transfer, or favorable work assignments, or selection to work overtime to make more money, or excuse from overtime, can be just as coercive in the election process as the authority to issue written warnings.

The Board itself in its decisions in *Delchamps*, *supra*, and *Flint Motor Inn Company*, *supra*, regarded the au-

thority to select employees for overtime and to schedule work as indications of significant authority. In its Supplemental Order, however, the Board did not even mention the authority to select employees for overtime in its discussion of Joan Carson, and placed no importance on it in its discussions of John McNeely, Vernal Massey, Jessie Merriweather, George McGhee, Jeannette Millington, Sammie Williams or Barry Williams, except to note in Merriweather's case that requests to avoid overtime were seldom denied. There was evidence, to which the Board does not allude, that when such requests were denied because a replacement could not be found, it was the groupleader who selected the employees required to work.

We turn now to the 15 groupleaders whose status as supervisors is conceded. We are not concerned with whether their votes would have affected the outcome since those ballots were not counted. The result of the election was 175 for the Union and 153 against. A switch of 12 pro-union votes to votes against the union would change the result.

The question is whether these supervisors might have affected the result because of the nature of their authority and the extent of their union activity.

The testimony shows that Massey, McNeely, Millington and Barry Williams supervised a total of 31 employees and possessed more than minimal authority to reward employees. They encouraged employees to support their pro-union position. Several others possessed the authority but merely attended the meetings. Obviously, mere attendance at meetings will not support an inference of coercion.

Joan Carson was a groupleader of 20 employees. She had the authority to select employees for overtime. The Board denigrates her power to recommend adverse action. Carson could issue oral warnings. Her supervisor said he would issue a written warning on her recommendation,

but would first check the employee's file to see if Carson had issued an oral warning. The Board said, "Accordingly, we find that Carson's recommendations of written reprimands were adopted only after independent investigation, and therefore she did not exercise major supervisory authority."

Merely checking a file to ascertain whether the groupleader had issued a prior oral warning cannot possibly be characterized as an "independent investigation" of the complaint. Furthermore, the Board's conclusion is inconsistent with the Act, which includes as supervisors those with power "effectively to recommend" adverse or favorable action, provided only that they exercise independent judgment in making the recommendation. 29 U.S.C. § 152(11). The Act does not preclude supervisory status simply because the recommendation is subject to a superior's investigation.

On this record it has been shown that 51 employees could possibly have been influenced by the pro-union activity of five of the groupleaders. Thus, we cannot say that the election was held in an atmosphere " 'free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.' " *ITT Lighting Fixtures*, 658 F.2d at 936, quoting *Sewell Manufacturing Company*, 138 N.L.R.B. 66, 70 (1962). A switch of only twelve votes would have changed the result of this election, and therefore it appears that a new election should be held. Since the Board has failed to avail itself of two opportunities to demonstrate the validity of its order, we conclude that the order should now be vacated.

The supplemental order issued on December 16, 1982, and reported at 265 N.L.R.B. 188 is vacated, the cross-petition for enforcement of the supplemental order is denied, and the election, which resulted in certification by the NLRB of the Union as the collective bargaining representative of the Company's employees, is set aside.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 771, Docket 80-4203

ITT LIGHTING FIXTURES, DIVISION OF ITT CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

Argued March 30, 1981

Decided Sept. 1, 1981

Arnold E. Perl, Richard M. Kobdish, Young & Perl, Memphis, Tenn., for petitioner.

William A. Lubbers, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Acting Associate Gen. Counsel, Elliott Moore, Deputy Associate Gen. Counsel, Howard E. Perlstein, Victoria A. Higman, Attys., N.L.R.B., Washington, D.C., for respondent.

Before WATERMAN and MANSFIELD, Circuit Judges and B. NEWMAN, Judge.*

WATERMAN, Circuit Judge:

This case is before this Court upon the petition of ITT Lighting Fixtures, Division of ITT Corporation ("Company") to review and set aside an order of the National Labor Relations Board ("Board") issued on September 26, 1980, and reported at 252 N.L.R.B. No. 46. The

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* Of the U.S. Court of International Trade, sitting by designation.

Board has cross-petitioned for enforcement of its order. Inasmuch as the Company transacts business within this judicial circuit, this Court has jurisdiction of the proceeding. 29 U.S.C. § 160(e) and (f).

The Company is engaged in the manufacture of lighting fixtures at its Southaven, Mississippi, facility, and it has a warehouse facility located in Memphis, Tennessee. On December 14, 1978, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, ("Union") filed a representation petition with the Board, seeking certification as the exclusive bargaining representative of the Company's production, maintenance and warehouse employees. Pursuant to the petition, a hearing was held with reference to defining the membership of the bargaining unit, at which the supervisory status of the Company's groupleaders was litigated.[1] On January 22, 1979, the Regional Director issued his Decision and Direction of Election. He found that the Union's proposed unit was an appropriate unit.[2] The Regional Director was unable to deter-

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[1] Section 2(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(3), excludes from the definition of employee "any individual employed as a supervisor." Section 2(11) of the Act, 29 U.S.C. § 152(11), defines "supervisor" as follows:

> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[2] All full-time and regular part-time production and maintenance employees, including tool crib attendant, shipping department and warehouse receiving department employees and clerks, tool and die shop employees, mechanical lab technicians, electrical lab technicians and quality control lab technicians, employed at the Employer's Southaven, Mississippi, location, and all employees employed at the Employer's warehouse located on Titan Drive in Memphis, Tennessee, including traffic control clerks, excluding office clerical em-

mine whether the groupleaders were unit employees or, as the Company contended, supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended, 29 U.S.C. 152(11) ("Act") and, accordingly, permitted them to vote by challenged ballot in the representation election. The Company's request that the Board review the Regional Director's failure to exclude the groupleaders from the unit was denied by the Board.

On February 16, 1979, pursuant to the Regional Director's Decision and Direction of Election, the Board conducted a secret ballot election. The tally of ballots showed that there were 362 ballots cast, of which 175 were cast for the Union, 153 against the Union and 34 that were challenged and not counted. Thus, the challenged ballots were sufficient in number to affect the results of the election. Thirty-one of these challenged ballots were cast by groupleaders.

Subsequent to the election, the Company timely filed Objections to Conduct Affecting the Results of the Election in which it alleged that it was severely prejudiced at the outset by the Regional Director's failure to find the groupleaders to be supervisors, and that the Union's showing of employee interest in unionization was tainted by the open and pervasive involvement of the groupleaders in activities on behalf of the Union. The Regional Director ordered an evidentiary hearing on the challenged ballots and on the Company's objections. After five days of testimony, the Hearing Officer issued his Report and Recommendations on Employers' Objections wherein he concluded, *inter alia*, that (1) the challenges to the ballots of the groupleaders be sustained inasmuch as they were supervisors within the meaning of the Act; and (2) the Company's above-mentioned objections be overruled.

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ployees, engineering department employees, technical employees, over-the-road truckdrivers, general foremen, foremen, guards and supervisors as defined in the Act. (Joint Appendix ("J.A."), p. 691).

The Regional Director, assuming arguendo that the groupleaders were in fact supervisors, adopted the Hearing Officer's recommendation that the Company's objection to their pro-union activities be overruled. However, the Regional Director sustained challenges to only 11 of the ballots of the groupleaders.[3] He found that a resolution of the other challenged ballots was unnecessary inasmuch as they would not affect the outcome of the election.[4] Thereupon the Regional Director filed a Supplemental Decision and Certification of Representation, certifying the Union as the exclusive bargaining representative for the Company's production, maintenance and warehouse employees employed at both of the Company's locations.

The Company filed a request for Board review of the Regional Director's Supplemental Decision and Certification of Representation. The Board only granted the Company's request for review of the issue of the challenged ballots. Nine months later, the Board filed its decision. It sustained the Regional Director's findings that the eleven groupleaders were supervisors, and further found an additional four groupleaders to be such.[5] It left unresolved the status of the other sixteen groupleaders inasmuch as their ballots "cannot affect the election results

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[3] Those groupleaders found to be supervisors by the Regional Director were: Christine Brown, Lonnie Edlin, Richard Hayes, Carolyn Smith, Billie Hamilton, Marie Mason, Shirley Spencer, Gilbert Vickers, Rebecca Jo Hamilton, Bobby Hobbs, and Joan Carson. (J.A. pp. 747-752).

[4] Thirteen ballots were not counted, for the Regional Director threw out two ballots in addition to the eleven ballots cast by individuals whom he held to be supervisors. Inasmuch as the Union had won the election by a margin of twenty-two votes, the remaining twenty-one challenged ballots cast by groupleaders, even assuming that they all had been cast against the Union, could not affect the results of the election.

[5] Those groupleaders found to be supervisors by the Board included: Jeanette Millington, Sammie Williams, Barry Williams and John McNeely. (J.A. p. 854).

and, consequently, further action with respect to them is unnecessary." The Board, accordingly, adopted the Regional Director's Certification of Representation. (249 N.L.R.B. No. 61).

The Company, however, refused to bargain with the Union on the ground that the Union was improperly certified, and, on October 2, 1979, the Board issued a complaint against the Company after receiving charges filed by the Union. The Company opposed the complaint and, opposing a subsequent motion for summary judgment, again raised objections to the propriety of the Board's certification of the union as the exclusive collective bargaining agent. On September 26, 1980, the Board granted the motion for summary judgment. It found the Company to be in violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union. The Board ordered the Company to bargain collectively with the Union. In its cross-petition the Board now seeks enforcement of that order.

The Company has concededly refused to bargain with the Union in order to obtain the judicial review it now seeks here of the Board's certification of the Union as the exclusive collective bargaining representative of the Company's employees.[6] Thus, the only issue before us on appeal is whether the pro-union statements and activities of many of the Company's groupleaders impaired the employees' freedoms of choice in the election so as to justify setting the election aside.

Charged with the responsibility of overseeing the activities of the participants in Board elections, the Board has viewed its function as one of ensuring that

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[6] This Court has noted in the past that a refusal to bargain, if it is a course pursued in good faith and on substantial grounds, is an appropriate means of obtaining judicial review of the Board's certification. *Catholic Med. Ctr. of Brooklyn & Queens v. N.L.R.B.*, 589 F.2d 1166, 1175 (2d Cir. 1978).

> . . . employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.

Sewell Manufacturing Company, 138 N.L.R.B. 66, 70 (1962).

It is well-established that the participation of a supervisor in a union election may in some circumstances so undermine the employees' freedom of choice as to warrant setting the election aside. *Catholic Medical Ctr. of Brooklyn, etc. v. N. L. R. B.*, 620 F.2d 20, 22 (2d Cir. 1980); *N. L. R. B. v. Handy Hardware Wholesale, Inc.*, 542 F.2d 935, #938 (5th Cir. 1976), *cert. denied*, 431 U.S. 954, 97 S.Ct. 2675, 53 L.Ed.2d 271 (1977); *Turner's Express, Incorporated v. N. L. R. B.*, 456 F.2d 289, 292-93 (4th Cir. 1972); *N. L. R. B. v. Metropolitan Life Insurance Company*, 405 F.2d 1169, 1178 (2d Cir. 1968).

The Board has explained the two-fold threat posed by the participation of a supervisor as follows:

> One, in situations where supervisors actively encourage employees to vote for the union and the employer takes no known stance to the contrary, the employees might be led to believe that the employer favors the union. The other conceivable effect involves the possibility that such conduct could coerce an employee into supporting the union out of fear of future retaliation by a union-oriented supervisor.

Turner's Express, Inc., 189 N.L.R.B. 106, 107 (1971).

Inasmuch as the Company here waged a vigorous campaign against the Union, this case clearly falls within the latter category. With reference to this second ground, it is well-settled that an election is not per se invalid merely

because there was some pro-union activity on the part of a supervisor. Rather, there must be a showing that the supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election. *Catholic Medical Ctr. of Brooklyn, etc. v. N. L. R. B., supra,* 620 F.2d at 22; *Turner's Express, Incorporated v. N. L. R. B., supra; N. L. R. B. v. Alamo Express, Inc.,* 430 F.2d 1032, 1035 (5th Cir. 1970). *Cf. N. L. R. B. v WKRG-TV, Inc.,* 470 F.2d 1302, 1315 (5th Cir. 1973); *N. L. R. B. v. American Cable Systems, Inc.,* 414 F.2d 661, 665 (5th Cir. 1969), *cert. denied,* 400 U.S. 957, 91 S.Ct. 356, 27 L.Ed.2d 266 (1970); *N. L. R. B. v. Ozark Motor Lines,* 403 F.2d 356, 359 (8th Cir. 1968), (union certification based upon an authorization card majority).

Under past Board rulings, in order to meet this required showing, it has not always been necessary that the pro-union supervisor threaten to use his supervisory powers in retaliation against an employee who disfavors the union. *Delchamps, Inc.,* 210 N.L.R.B. 179, 180 (1974); *Flint Motor Inn Company, Inc., d/b/a Sheraton Motor Inn,* 194 N.L.R.B. 733, 734 (1971). However, in the absence of such a threat, the Board would appear to look to two factors in determining whether pro-union supervisory conduct had a coercive effect upon employees: (1) the degree of supervisory authority and (2) the extent, nature and openness of the pro-union activity.

Thus, in *Delchamps, Inc.,* the Board stated:

> The Hearing Officer found no credible evidence that meat department managers made threats that employees under them would not receive wage increases and would suffer other adverse treatment unless they supported the Petitioner. However, because the authorities possessed and exercised by the meat department managers are of the type which greatly affect working conditions, he found that the open support of

> the Petitioner by some of them would tend to restrain employees in their right not to support the Petitioner.

210 N.L.R.B. at 180.

In applying these general principles to the case before us, we preliminarily note that the determination of whether the election was tainted by the coercive effect of *pro-union* supervisory conduct is "essentially a matter of drawing inferences, and it has long been settled that an agency's conclusions based upon such inferences should not be set aside by a reviewing court unless they transgress the bounds of reason." *Catholic Medical Ctr. of Brooklyn, etc. v. N. L. R. B., supra*, 620 F.2d at 22.

Throughout these proceedings, the Company has maintained that the groupleaders were "supervisors," that they were in the forefront of the Union's organizational efforts, that they constituted the single most effective and persuasive group of Union supporters in the Company's employ, and that the election was tainted by the coercive effect of pro-union supervisory conduct. Indeed, at the hearing on the challenged ballots and on the Objections to the Conduct Affecting the Results of the Election, the parties stipulated to substantial involvement by the groupleaders.

The stipulations were, *inter alia*, as follows:[7] During the critical period, i.e., the period after the filing of the representation petition seeking certification of the bargaining unit,[8] Groupleader Jackson dined with a Union Representative together with three other employees, and the Union Representative paid for the meal; groupleaders attended union meetings and invited and encouraged other employees to attend; groupleaders spoke out on behalf of

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[7] See J.A. pp. 161-168.

[8] *See Ideal Electric and Manufacturing Company*, 134 N.L.R.B. 1275 (1961). There the Board ruled that an election will not be set aside on the grounds of objectionable conduct occurring prior to the filing of the petition.

the Union and frequently campaigned in favor of the Union; groupleaders told employees that, through bargaining, the Union might obtain better benefits and wages and the elimination of favoritism; groupleaders told the employees about the virtues of the UAW, including its size, structure and its involvement in the area; Groupleader Gray attended a union meeting with approximately 100 employees present, spoke about job security and indicated that she had been transferred against her wishes;[9] Groupleader Millington spoke at a union meeting with approximately 40 employees present and complained about the treatment of a relative in a job assignment; Groupleaders Gray, Smith, Johnson, Sammie Williams and Barry Williams attended an informal union meeting together with 12 other employees wherein a union attorney advised the groupleaders that, in his opinion, they were not supervisors and therefore could continue to engage in union activity, informing them that the Company was anti-union and would do everything it could to win the election; Groupleaders Gray, Johnson, Sammie Williams, Barry Williams and Smith, together with about seven other employees, attended meetings with a Union Rep-

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[9] We quote groupleader Joanne Gray's entire speech as it is set forth in Stipulation #14 (J.A. pp. 167-168):

> Everyone had better get out and vote for the union. They transferred me to the other warehouse because someone told them I was a strong backer for the union. They said they were training me for a foreman's job, but they were just lying to me. If you don't vote for the union, you can be done the same way I was done. I worked my but[t] off for fourteen years and this is how they treat me. They jerk me up and move me without any explanation. The ones that don't vote for the union, don't come to me crying about your problems afterwards because I don't want to hear them. The company made a lot of promises after the last election, and they didn't keep them. So, there is no proof they will keep the promises they make to you now—If we don't get the union in, I don't want to hear any complaints from anybody. This is our opportunity to be able to stand up for ourselves and speak for ourselves.

resentative in order to supply the first names of employees on the voting list, voiced their opinions on how people would vote, and volunteered to attempt to influence employees on the list whom they knew to be anti-union or whose feelings were unknown; and Gray and Barry Williams wore T-shirts bearing pro-union slogans. Also, it was stipulated that prior to the critical period groupleaders attended union meetings, solicited authorization cards from employees and passed them on to the Union. Gray and Barry Williams each obtained 3 or 4 signed cards and Sammie Williams one. Moreover, at least half of the groupleaders signed cards themselves.

In addition, the Union conceded on the record that 14 other groupleaders, making a total of 17, attended union meetings.[10]

The Hearing Officer found that there was little real dispute among the witnesses as to the supervisory authority of the groupleaders. He noted that the parties contended that all groupleaders had essentially the same employment status, responsibility, and conditions of employment. He found that the groupleaders had the power effectively to recommend verbal and written warnings for misconduct and production lapses. However, he noted that generally certain other persons conceded to be supervisors and the Company's Personnel Department independently investigated the subject matter of these recommendations. The Hearing Officer further found that groupleaders had authority to direct and assign work and to transfer employees between departments and could exercise independent judgment and discretion when so doing. He found that the record failed to establish that groupleaders had any authority to grant or deny time off. Accordingly, he found all groupleaders to be supervisors within the

[10] Those fourteen are the following: S. Williams, B. Williams, D. Jackson, J. Carson, J. Gray, J. McNeely, B. Jackson, E. Millington, A. Smith, V. Massey, D. Abbott, T. Henley, C. Brown, and B. Jackson. (J.A. pp. 147-148).

meaning of Section 2(11) of the Act, and he recommended that the challenges to the ballots of all the groupleaders be sustained. (Of course, this sustaining of the challenges would not affect the ballot count result of the election).

In so holding, the Hearing Officer pointed out, however, that they were " 'minor supervisors' without the authority, in the interest of the Employer, to hire, fire, suspend, layoff, recall, promote, discharge, reward, or discipline employees on their own volition." (J.A. 732). He concluded that the groupleaders had very limited authority and had little or no opportunities for affecting the employment status of other employees.

The Hearing Officer further found that there was "no evidence to indicate that the groupleaders coerced or threatened employees into voting for the Union, or that any action was taken to make the employees fear possible retribution at their hands if they did not adhere to their wishes." (J.A. 734-735).

For these reasons, he concluded that the pro-union activities of the groupleaders did not impair the employees' freedoms of choice in the election or constitute interference which would warrant setting aside the election.

The Regional Director accepted the Hearing Officer's recommendation that the challenges to the ballots of only eleven of the groupleaders be sustained. His reasons for so doing were that: "The record, with regards to many of the remaining group leaders, is replete with contradictions as to their authority and responsibility. With respect to others, the record is devoid of sufficient evidence on which to make findings concerning their supervisory status." (J.A. 753).

Thus, rather than remand the case to the Hearing Officer for the purpose of resolving the conflict in testimony and making findings regarding credibility, the Regional

Director chose instead to leave the status of the remaining groupleaders unresolved.

With reference to the Company's Objections to Conduct Affecting the Results of the Election as it pertained to the pro-union activities of the groupleaders, the Regional Director disposed of the issue by concluding that, assuming arguendo that the groupleaders were supervisors, they were "minor" supervisors as opposed to "major" supervisors and, hence, had no real opportunity to affect the employment status of other employees. He was thus able to make this subtle distinction despite the fact that the evidentiary contradictions and the insufficiency of evidence which he had noted had prevented him in the first place from determining whether they were supervisors at all.

With reference to the eleven groupleaders whose ballots were thrown out because the Regional Director found them to be supervisors, we note that the Regional Director went further than simply to affirm the findings of fact made by the Hearing Officer. He made his own findings that various groupleaders possessed the following indicia of supervisory authority: the authority responsibility to direct the work of employees,[11] to assign employees to various jobs on the line,[12] to transfer employees to other lines and departments,[13] effectively to recommend written warnings to employees,[14] effectively to recommend suspen-

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[11] Christine Brown, Lonnie Edlin, Richard Hayes, Carolyn Smith, Rebecca Jo Hamilton, Bobby Hobbs and Joan Carson.

[12] Billie Hamilton, Marie Mason, Shirley Spencer, Gilbert Vickers, Rebecca Jo Hamilton, Bobby Hobbs, and Joan Carson.

[13] Billie Hamilton, Marie Mason, Shirley Spencer, and Gilbert Vickers.

[14] Billie Hamilton, Marie Mason, Shirley Spencer, and Gilbert Vickers.

sions,[15] to assign overtime,[16] and to grant time off.[17] Furthermore, he found that employees had been told that they were to follow the instructions of the various groupleaders and that the groupleaders would train them, assign them work, and enforce company rules and regulations.[18]

The Company appealed the Regional Director's decision to the Board. Review was granted only as to the issue of the challenged ballots. Upon appeal, the Board adopted the Regional Director's findings and conclusions, and, additionally, found four more groupleaders to be supervisors as they possessed the authority to adjust employee grievances, to approve overtime, to grant time off, to reassign employees to different work areas, and to issue oral warnings.

The Board left unresolved the status of the remaining eighteen groupleaders.

Our problem with this case does not lie with the Board's adoption of the primary findings of fact set forth in the decisions of the Hearing Officer and the Regional Director, or with the Board's own supplemental primary findings. These findings of fact, as far as they went, are clearly supported by sufficient evidence in the record taken as a whole. While we thus do not find fault with the Board's primary findings of fact, when we move from those primary findings of fact to the Board's conclusions of law with reference to the Company's Objections to Conduct Affecting the Results of the Election, we note that

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[15] Billie Hamilton, Marie Mason, Shirley Spencer, and Gilbert Vickers.

[16] Billie Hamilton, Marie Mason, Shirley Spencer, Gilbert Vickers, and Joan Carson.

[17] Billie Hamilton, Marie Mason, Shirley Spencer, and Gilbert Vickers.

[18] Rebecca Jo Hamilton and Bobby Hobbs.

the conclusions are not supported by essential findings relative to two issues: first, whether, based upon the evidence and findings of fact reached thereon, the groupleaders or any of them who engaged in pro-union activity during the critical period were "supervisors," setting forth the criteria for such; and then, if so, whether their pro-union activity could effectively affect the votes of employees. By only looking at the groupleaders' challenged ballots the Board has thus far avoided the issue before it—that of whether any of the 175 ballots cast for the Union were affected by the groupleaders' conduct.[19] We note that all the Regional Director said in affirming the conclusions of the Hearing Officer on this issue was:

> [T]he undersigned, for the reasons stated in the Hearing Officer's Report, hereby adopts the Hearing Officer's findings and recommendations with respect to the Employer's objections. In particular it is noted, assuming *arguendo* that the group leaders involved in union activity were supervisors, they were "minor" as opposed to "major" supervisors with no real opportunity to affect the employment status of other employees. See *Admiral Petroleum Corporation*, 240 NLRB No. 122. J.A. 753.

The Regional Director thus repeated the bare conclusory statement of the Hearing Officer that the group-

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[19] In limiting its review to the issue of the proper status to be awarded the challenged ballots, it can be said the Board thereby affirmed the Regional Director's decision that, even assuming all the groupleaders were supervisors, they had not engaged in conduct that would warrant setting aside the election. Section 102.67 (f) of the Board's Rules and Regulations, Series 8, as amended (29 C.F.R. § 780 (1980 Ed.)) provides that "[d]enial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

Such a result appears to us to be untenable in view of the scant treatment that the Regional Director gave to groupleader conduct in his findings.

leaders were "minor" supervisors despite his own extensive supplemental findings with reference to the groupleaders' opportunities to affect the employment status and working conditions of other employees. The Regional Director does not discuss what weight, if any, he gave to his supplemental findings that the groupleaders possessed the authority to assign overtime, to grant time off, and effectively to recommend suspensions. Indeed, he provides no analysis as to the difference between "major" and "minor" supervisors and does not explain what factors he takes into consideration in arriving at this distinction.

The cases cited by the Regional Director and the Hearing Officer in their respective decisions are unenlightening. The Board's decision in the case of *Admiral Petroleum Corporation* cited by them is clearly inapposite and in no way provides authority for the conclusion that the groupleaders were but "minor" supervisors. In *Admiral Petroleum Corporation*, 240 N.L.R.B. 894 (1979), the one supervisor in question was recognized to be a major supervisor. He was found to be "in charge of employing and scheduling casual and part-time employees . . . and would participate in the employment of fulltime employees." *Id.* at 896. He assigned work, resolved employee grievances, and granted overtime. While the Board there, by adopting the Hearing Officer's conclusions, recognized that the "degree of supervisory authority may serve to exaggerate the coercive nature of a statement by making it more likely that a threat will in fact be carried out," *Id.* at 894, it did not rest its decision on the lack of any such supervisory authority on the part of the supervisor in question. Instead, its decision rested on the innocuous nature of the pro-union statements made by the supervisor and the rather minimal union activities in which he was involved.

The other cases cited by the Hearing Officer are the Board's decision in *Turner's Express, Inc., supra*, and in

Diversified Products Corp., 199 NLRB 1024 (1972), and also those in *Gary Aircraft Corporation*, 220 NLRB 187 (1975); *Fall River House, Inc.*, 196 NLRB 74 (1972); *The Pine Cone Inc.*, 189 NLRB 569 (1971); and *Stevenson Equipment Company*, 174 NLRB 865 (1969). None of these cases are helpful in shedding light on the meaning of the major supervisor/minor supervisor distinction. In none of the latter four cases did the Board go beyond the mere conclusory statement that the supervisors involved in union activities were "minor" and it made no specific findings of the various indicia of supervisory authority. Moreover, those cases as well as *Diversified Products Corp.* can be distinguished from the case before us in that in all of them, in contrast to the pro-union activity found here, there was only minimal pro-union activity by the supervisors during the critical period.

In *Turner's Express, Inc.*, as well, the Board made no findings and set forth no indicia of supervisory authority but rested its decision on the bare assertion that the supervisors were "minor," and, as such, concluded that there was no reasonable basis for believing that fear of supervisory retaliation destroyed the employees' freedoms of choice in the election. The decision in *Turner's Express, Inc.*, however, was reversed by the Fourth Circuit in *Turner's Express, Inc. v. NLRB*, 456 F.2d 289 (4th Cir. 1972),[20] where the Court found the Board's designation of the two supervisors as "minor" to be unsupported by the evidence and the law.[21]

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[20] The Board's certification decision in *Turner's Express, Inc.* came before the Fourth Circuit upon appeal of the Board's subsequent Decision and Order on a refusal to bargain charge which is reported at 182 N.L.R.B. No. 89.

[21] The Court there held: "The Board's designation of Robbins and Tebo as 'minor supervisors' is not supported by the evidence or the law. The Act does not grade supervisors as major or minor." 456 F.2d at 291. We note that the *Turner* case differs from the case before us in that that case presented clear evidence of supervisory threats of retaliation against employees voting against the union.

In an apparent attempt to bring this case within the strictures of *Diversified Products Corp., supra*, and *NLRB v. Decatur Transfer & Storage, Inc.*, 430 F.2d 763 (5th Cir. 1970) the Hearing Officer states in his Report and Recommendations that ". . . it is a long-established principle that if an employer is aware of a supervisor's union activities and then stands idly by, the employer may not subsequently rely on the supervisor's conduct for setting aside the election." (J.A. 736). While this is an accurate statement of the law, it has no application here. Here, prior to the election the Company had requested a ruling from the Board upon the status of the groupleaders, and here, as a result of the Regional Director's failure to resolve the issue at that point, the Company, if the groupleaders should subsequently be determined not to be supervisors, was precluded from then interfering with their pro-union campaign activities for fear that such interference would constitute an unfair labor practice.

Moreover, we cannot agree with the Hearing Officer when he states that the fear of supervisory retaliation is ". . . . unlikely in circumstances where an employee recognizes that any maltreatment or punishment by a supervisor predicated upon the employee's opposition to the union can be brought to the attention of higher management officials who share the employee's views on unionization." (J.A. 735). Rather, we are in agreement with the Third, Fourth and Fifth Circuits which have rejected the attitude of higher management toward the union as a factor which is determinative of the issue of coerciveness of supervisory participation in the union campaign. *N.L.R.B. v. Handy Hardware Wholesale, Inc., supra*, 542 F.2d at 938; *N.L.R.B. v. Boyer Brothers, Inc.*, 448 F.2d 555, 564 (3d Cir. 1971), *cert. denied*, 409 U.S. 878, 93 S.Ct. 132, 34 L.Ed.2d 132; *N.L.R.B. v. Heck's Inc.*, 386 F.2d 317, 322 (4th Cir. 1967). As stated in *Handy Hardware Wholesale, Inc.*, a case which was cited with approval by this Circuit in *Catholic Medical Ctr. of Brook-*

lyn, etc. v. N.L.R.B., supra, 620 F.2d at 22 (2d Cir. 1980):

> It has frequently been held that the participation of a supervisor in a union election undermines the "laboratory conditions" necessary for an unfettered choice. [Citations omitted]. . . . This is true even if the employer, as here, openly urged the defeat of the Union, since the supervisor might well be able to recommend if not actually cause the dismissal or other adverse treatment of the employee disguising the true motives of the recommendation in innumerable ways. The likelihood of such occurrences is less important than the possibility that an employee might fear such retribution and act accordingly.

542 F.2d at 938.

Most importantly, the Board has made no attempt to either distinguish or reconcile the record before it in this case with its decisions in the similar cases of *Delchamps, Inc., supra*, and *Flint Motor Inn Company, d/b/a Sheraton Motor Inn, supra.*

In *Delchamps* the employer contended prior to the election that its meat department managers were supervisors. Contrary to the employer's contention, the Regional Director found them to be employees and refused to exclude them from the voting unit. The employer's request for review of the Regional Director's decision was denied by the Board. Following the election, won by the union, the employer filed objections to the election, reiterating its contention that the meat department managers were supervisors, and arguing that the election should be set aside because of the managers' extensive involvement in the union's organizing campaign. The Regional Director overruled the employer's objections. The Board, however, granted review and ordered a hearing on the issue of those objections.

Following that hearing, the Board acknowledged that the agency had erred in its determination, prior to the election, that the meat department managers were not supervisors. The Board found that the meat department managers possessed the authority to assign and direct work, to schedule, to train and to evaluate meat department employees in the performance of their respective tasks, to grant time off, to select employees for overtime, to reprimand and to discipline employees, and to recommend pay raises, transfers, promotions and discharges, and that there was evidence that some of the managers hired and fired employees.

As to the alleged objectionable conduct, the Board found that:

> . . . the meat department managers joined and supported the Petitioner from the beginning of its campaign to organize the employees involved and continued their active and open support through the "critical period." Many of them joined the Petitioner and solicited employees under them to join. Four or five of them were on the Petitioner's organizing committee established prior to the filing of the petition. They distributed, solicited signatures to, and collected cards for the Petitioner. They attended and urged employees to attend union meetings. They wore union pins and urged employees to vote for the Petitioner.

Id. at 180.

Although there was no credible evidence that the meat department managers made threats that employees under them would suffer adverse treatment unless they supported the union, the Board concluded that their activities in support of the union had such a pervasive effect upon the employees' freedoms of choice as to require that the election be set aside.

So, too, in *Flint Motor Inn Company*, where the one supervisor involved was found to possess the authority to

hire, to train, to discipline, to schedule work, including overtime work, to supervise the Employer's kitchen staff, and to reprimand waitresses, the Board concluded that, despite the absence of threats to use supervisory authority to punish those who did not support the union ". . . given [his] considerable supervisory authority and his active and outspoken support of the Union throughout the organized campaign, there is a reasonable 'possibility that [his] conduct could coerce an employee into supporting the union.'" (Citing *Turner, supra*), 194 N.L.R.B. at 734.

It is true that in the case before us the groupleaders possessed no authority to hire, to fire, or to promote employees, or to issue written warnings on their own volition, but there is voluminous testimony in the record, albeit at times conflicting, as to their authority effectively to recommend such action. In light of the above-mentioned danger that supervisors bent on retaliation could indeed disguise their true motives in recommending that adverse action be taken against an anti-union employee, we do not believe that this distinction sufficiently sets this case apart from the factual circumstances upon which the *Delchamps* and *Flint* cases rest. And yet, despite much evidence in the record, no findings of fact were made evaluating these several indicia of supervisory authority. Surely such adjudications are crucial before the Board can fairly reach the conclusion that the groupleaders involved here are "minor" supervisors. Moreover, the Board cannot be allowed to circumvent its obligation to explain its departure from clear precedent simply by failing to make the necessary factual determinations which would bring a case within the bounds of precedent. See *N.L.R.B. v. Metropolitan Life Insurance Company*, 380 U.S. 438, 442-443, 85 S.Ct. 1061, 1064, 13 L.Ed.2d 951 (1965); *Marco Sales Company v. F.T.C.*, 453 F.2d 1, 7-8 (2d Cir. 1971).

Due to the lack of specific findings and articulated reasons for the distinction between this case and the cases of

Delchamps and *Flint*, the Board's action cannot properly be reviewed by this Court.

The Board in its presentation to us now attempts to set our case apart from these above-discussed cases by attempting to qualify its findings as set forth above by characterizing the authority of the groupleaders as "largely ministerial," limited to bringing problems to the attention of higher management, and "limited by the routine nature of the work." (Brief for the Board, pp. 14-15). No such limitations of authority are delineated in the opinions of the Regional Director, the Hearing Officer, or the Board, which would now permit such characterizations of the various indicia of supervisory authority stated in the record as found to exist by them. Moreover, this Court cannot now accept appellate counsel's post-hoc rationalizations for the disparate treatment in these cases. *See N.L.R.B. v. Metropolitan Life Insurance Company*, 380 U.S. at 444, 85 S.Ct. at 1064; *N.L.R.B. v. Columbia University*, 541 F2d 922, 931 (2d Cir. 1976).

Were we the decision-makers in this case, we ourselves might be inclined to infer from the record that the type of day-to-day authority over employees which the groupleaders possessed would warrant our holding that the retaliatory potential of the groupleaders is sufficient to make their extensive involvement in the union campaign coercive upon the employees. However, the determination of the coercive effects of groupleader participation in the election campaign must initially lie with the Board, inasmuch as this is an issue the adjudication of which is clearly committed in the first instance to the agency. "For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review." *NLRB v. Metropolitan Life Insurance Company, supra*, 380 U.S. at 444, 85 S.Ct. at 1064.

Reversed and remanded to the Board for further proceedings and action in the light of the content of this opinion.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 26—CA—8050

ITT LIGHTING FIXTURES,
DIVISION OF ITT CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

SUPPLEMENTAL DECISION AND ORDER

On September 26, 1980, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] in which it found that by refusing to bargain with the Union, certified by the Board in Case 26—RC—5908 on May 9, 1980,[2] Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended. The Board ordered Respondent to cease and desist from its unlawful conduct, and to recognize and bargain with the Union. Subsequently, Respondent filed with the United States Court of Appeals for the Second Circuit a petition for review of the Board's Order, and the General Counsel filed a cross-petition for enforcement.

In an opinion dated September 1, 1981,[3] the court denied enforcement of the Board's Order and remanded the case to the Board for further proceedings and action in light of the court's opinion. Thereafter, Respondent and

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[1] 252 NLRB 328.

[2] 249 NLRB 441.

[3] 658 F.2d 934.

the Union filed statements of position, and Respondent filed an answering brief.[4]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have carefully reviewed the entire record in the underlying representation proceeding, as well as the statements of position, and, for the reasons discussed below, we have decided to reaffirm our Certification of Representative issued in Case 26—RC—5908 and our previous Order in this proceeding.[5]

Respondent refuses to bargain with the Union on the ground that the Union was improperly certified inasmuch as the activities of Respondent's group leaders on behalf of the Union interfered with employees' free choice in the election. In this regard, Respondent contends that the group leaders are supervisors within the meaning of the Act and, as such, their open and pervasive involvement in the Union's campaign necessarily would have coerced employees into supporting the Union.

In the underlying representation proceeding, a Hearing Officer found that the group leaders were statutory supervisors, and he recommended that Respondent's challenges to 31 group leaders' ballots be sustained. The Hearing Officer concluded, nevertheless, that the group leaders were "minor" supervisors without the authority, in the interest

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[4] We hereby deny Respondent's motion for oral argument and its motion that the Board strike the Union's statement of position.

[5] On February 19, 1982, the Board directed that the record in this case be reopened and that a hearing be held before an administrative law judge for the purpose of taking evidence and making findings of fact on issues raised by Respondent's objections to the election held in Case 26—RC—5908. Subsequently, on April 7, 1982, the Board granted Respondent's motion for reconsideration, and rescinded the Order reopening the record. Neither Order was published in bound volumes of Board Decisions.

of Respondent, to hire, fire, suspend, lay off, recall, promote, discharge, reward, or discipline employees on their own volition. Further, the Hearing Officer recommended that Respondent's objections be overruled, finding that "the prounion activities of group leaders did not impair the employees' freedom of choice in the election, or constitute interference which would warrant setting aside the election." Accordingly, the Hearing Officer recommended that the Union be certified.

Thereafter, the Regional Director issued his Supplemental Decision and Certification of Representative. Contrary to the Hearing Officer, he found that the evidence was sufficient to establish the supervisory status of only 11 of the group leaders, and that the record was either insufficient or contradictory with respect to the status of the other 20 group leaders. The Regional Director, however, decided that he need not resolve the challenges to the ballots of those 20 remaining group leaders, since they would not be determinative of the election result.

The Regional Director adopted the Hearing Officer's findings that the group leaders' union activities did not constitute objectionable conduct. In so doing, he stated that "assuming *arguendo* that the group leaders involved in union activity were supervisors, they were 'minor' as opposed to 'major' supervisors with no real opportunity to affect the employment status of other employees."

Subsequently, the Board granted Respondent's request for review of the Regional Director's supplemental decision only with respect to whether the 20 remaining group leaders were supervisors for the purpose of resolving the challenges to their ballots. Review was denied as to the Regional Director's overruling of Respondent's objections. In its Decision on Review,[6] the Board agreed with the Regional Director that 11 of the group leaders were supervisors, but also found sufficient uncontradicted evi-

[6] 249 NLRB 441.

dence to establish the supervisory status of 4 additional group leaders. Inasmuch as the challenged ballots of the 16 remaining group leaders were not determinative—the Union having received a 22-vote majority of the ballots counted—the Board left unresolved their supervisory status. As mentioned above, the Board subsequently found that Respondent's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act.[7]

In refusing to enforce the Board's bargaining order, the court of appeals remanded the case for further findings on the supervisory authority of the group leaders and whether their "pro-union activity could effectively affect the votes of employees." The court stated that such findings were necessary because the Regional Director failed to provide any "analysis as to the difference between 'major' and 'minor' supervisors," and did not "explain what factors he takes into consideration in arriving at this distinction."

As the court acknowledged, it is well settled that an election is not *per se* invalid merely because there was some prounion activity on the part of a supervisor. Instead, there must be a showing that the supervisor's conduct reasonably tended to have such a coercive effect on employees that it was likely to impair their freedom of choice in the election.[8] Prounion supervisory conduct may reasonably tend to coerce employees even where, as here, the supervisors have made no threats of retaliation. The court of appeals here pointed out that, in the absence of threats, determining whether prounion supervisory conduct was coercive requires examination of two factors: (1) the degree of supervisory authority, and (2) the extent, nature, and openness of the prounion activity. With respect to the former, we read the court's opinion

[7] 252 NLRB 328.

[8] See, e.g., *Turner's Express, Incorporated*, 189 NLRB 106 (1971); *Stevenson Equipment Company*, 174 NLRB 865 (1969).

as approving the distinction that the Board has made in prior cases between "major" and "minor" supervisory authority in assessing the coercive effect of supervisors' union activities. This distinction is based on the recognition that only those supervisors who can take or effectively recommend adverse action—i.e., major supervisors—possess the retaliatory potential sufficient to make their extensive involvement in a union campaign coercive upon employees.

We view it as the law of the case, and as the proper statement of the law, that a group leader is a major supervisor only if he possesses the authority to hire, fire, promote, or issue written warnings on his own volition, or has the authority effectively to recommend such action. Respondent admits, and the court found, that the group leaders have no authority, on their own volition, to hire, fire, suspend, lay off, recall, promote, reward, discipline, or issue written warnings. Consequently, the only indicia of major supervisory authority which any of the group leaders may possess—if they possess any—is the authority effectively to recommend hiring, firing, promotions, or written warnings.

The court stated that there is "voluminous testimony in the record, albeit at times conflicting, as to" the group leaders' authority effectively to recommend hiring, firing, promotions, or written warnings. We note, however, that said testimony pertains almost exclusively to group leaders who did not engage in union activity.[9]

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[9] For example, testimony concerning written warnings issued in reliance on group leaders' recommendations involved group leaders Rebecca Hamilton, Richard Hayes, Bobby Hobbs, Robert Johnson, Jessie Merriweather, Jeannette Noe, and Gilbert Vickers. Only Merriweather engaged in union activity. In addition, evidence that group leaders have the authority effectively to recommend discharge, suspension, or layoff, involved group leaders Rebecca Hamilton, Robert Johnson, George McGhee, and Gilbert Vickers. Of this group, only McGhee engaged in union activity.

Further, the "voluminous testimony" referred to by the court and relied on by Respondent must be viewed in light of the well-established principle that the authority effectively to recommend generally means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation ultimately is followed.[10]

The parties stipulated, and the record shows, that 16 of the 31 group leaders in question did not engage in any union activity.[11] Accordingly, their supervisory authority is irrelevant to our decision here, and we will focus only on the remaining 15 group leaders.[12] Respondent presented much testimony about the duties of group leaders, generally, in attempting to demonstrate that they all have essentially the same functions and responsibilities. Nevertheless, Respondent conceded that there are differences in both the amount of supervision under which particular group leaders work, and the authority they exercise over employees. Consequently, evidence relating specifically to individual group leaders will be accorded the most weight in reaching our determination. We now will consider the supervisory authority and union activity of each of the 15 group leaders.[13]

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[10] See, e.g., *J. K. Electronics, Inc., d/b/a Wesco Electrical Company*, 232 NLRB 479 (1977); *Reliance Insurance Company and Planet Insurance Company d/b/a Reliance Insurance Companies*, 173 NLRB 985 (1968).

[11] Specifically, Carolyn Barnes, Ernest Bolen, Lonnie Edlin, Billie Hamilton, Rebecca Hamilton, Richard Hayes, Bobby Hobbs, Robert Johnson, Marie Mason, Jeannette Noe, Linda Sappington, Shirley Spencer, Gilbert Vickers, Thelma Warf, Dorothy Willard, and Mary Wright.

[12] These 15 are: Dewey Abbott, Christine Brown, Joan Carson, Jo Ann Gray, Terry Henley, Barbara Jackson, Richard Johnson, Vernal Massey, George McGhee, John McNeely, Jessie Merriweather, Jeannette Millington, Carolyn Smith, Barry Williams, and Sammie Williams.

[13] Almost all of the evidence of group leaders' union activities is the result of a stipulation entered into by the parties at the hearing.

Dewey Abbott: Abbott was a group leader on the third shift, which consists of a small number of employees. No evidence regarding his supervisory authority was adduced at the hearing, and he is 1 of 16 group leaders (8 with union activities, and 8 without) whose supervisory status was left unresolved at the prior stages of this case. Accordingly, we find insufficient evidence to demonstrate that Abbott was a supervisor within the meaning of the Act. Therefore, his stipulated union activity—attending a union meeting on February 11, 1979—is immaterial to our decision.[14]

Christine Brown: Brown directed the work of 11 employees on an assembly line in the uniflux department. The Regional Director found Brown to be a statutory supervisory, relying on her responsibility to see that her line was run properly, which included changing products, deciding whether scrap could be repaired, and assigning employees to various tasks. The Board affirmed that finding in its Decision on Review. The only evidence of major supervisory authority was the testimony of Elvin Knight, Brown's foreman, that about a month after the election he relied on her recommendation that a temporary employee be offered a permanent position. We find this testimony insufficient to establish that Brown possessed the major supervisory authority effectively to recommend hiring or promotions. We note in this regard that the record indicates that foremen invariably conducted independent investigations before acting in those instances where they allegedly "relied" on group leaders' recommendations.

Brown's only union activity was her attendance at a union meeting on December 3, 1978—prior to the critical

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[14] Despite Respondent's suggestion to the contrary, we are not required by the circuit court's opinion to find that all of the group leaders are supervisors. Respondent's contention and the Regional Director's statement that all the group leaders possessed "similar duties and responsibilities" do not relieve Respondent of its burden to show that any particular group leader had supervisory authority.

period. At that meeting, she spoke out on behalf of the Union.

Joan Carson: Carson was a group leader in the ballast assembly department. The Regional Director concluded that she exercised independent judgment in making job assignments and responsibly directing the work of the 20 employees on her line, and therefore she was a supervisor within the meaning of the Act. As to major supervisory authority, Carson's foreman, Ronnie Wirt, stated that he would give "total weight" to Carson's recommendation that an employee be discharged. Wirt, however, qualified this by explaining that he would investigate the situation before taking discharge action. On the other hand, Wirt testified that he would not conduct an independent investigation before giving an employee a written warning on Carson's recommendation, even though such an occasion had not arisen. He added that an oral warning was the strongest discipline that Carson could administer on her own. Subsequently, Wirt stated that he would issue a written warning on Carson's recommendation only if he had noted in his files that the employee had received a prior oral warning about the matter. Accordingly, we find that Carson's recommendations of written reprimands were adopted only after independent investigation, and therefore she did not exercise major supervisory authority.

The Union conceded that Carson attended union meetings before the critical period on December 3, 1978, and during it on February 15, 1979.[15] The parties stipulated that Carson encouraged the employees in her department to attend such meetings and that she spoke out on behalf of the Union at the two meetings. There is no evidence that Carson engaged in any other union activity.

Jo Ann Gray: Shortly before the filing of the petition on December 14, 1978, Gray was transferred from Respondent's main facility in Southaven, Mississippi, to its

[15] All subsequent dates refer to 1979 unless otherwise stated.

warehouse in Memphis, Tennessee, about 8 miles away. In a different proceeding, the Board on April 20, 1982, affirmed an Administrative Law Judge's finding that Respondent unlawfully transferred Gray to the warehouse in order to curb her union activities among employees at the larger facility.[16]

Before the transfer, Gray was the group leader in Southaven's shipping department, where she worked with one other employee and spent all of her time engaged in manual labor and related paperwork. After the transfer to the warehouse, Gray was the group leader over six full-time and three part-time employees. Gray's foreman told her at the beginning of each shift what work needed to be done, and then Gray assigned the work to the various warehouse employees. Gray estimated that she spent 90—95 percent of her time loading trucks and doing related paperwork, and only 5—10 percent of her day telling other employees what to do. Her uncontroverted testimony was that she had no authority to grant time off or to issue written warning notices. She testified that, in almost 4 years as a group leader, the first time she was informed she had the authority to give written warnings occurred about 2 weeks after the election.

In its April 1982 decision, the Board affirmed the Administrative Law Judge's finding that Gray was not promoted to a supervisory position until April 1979, or about 2 months after the election. Gray's above-mentioned testimony in this case is not inconsistent with her testimony in the unfair labor practice proceeding which was the subject of the Board's earlier decision. Nevertheless, the testimony of her foreman in this case would tend to show that she exercised independent judgment in assigning and directing the work of Memphis warehouse employees. We find it unnecessary to resolve this conflict because, even if we accepted her foreman's testimony and found her to be a supervisor during the critical period, it is

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[16] 261 NLRB No. 34.

clear that at the time she was engaged in union activity Gray did not possess any of the indicia of major supervisory authority identified by the Second Circuit.

Gray was the most active group leader in support of the Union. At the January 21 union meeting, with approximately 75 employees present, Gray spoke out on job security and said she was transferred to the Memphis warehouse against her wishes. Gray added that she was all for the Union and would do everything she could to support it. At the February 11 union meeting—5 days before the election—Gray said the following to a group of about 100 employees:

> Everybody had better get out and vote for the union. They transferred me to the other warehouse because someone told them I was a strong backer for the union. They said they were training me for a foreman's job, but they were just lying to me. If you don't vote for the union, you can be done the same way I was done. I worked my but [sic] off for fourteen years and this is how they treat me. They jerk me up and move me without any explanation. The ones that don't vote for the union, don't come to me crying about your problems afterwards because I don't want to hear them. The company made a lot of promises after the last election, and they didn't keep them. So, there is no proof they will keep the promises they make to you now. If we don't get the union in, I don't want to hear any complaints from anybody. This is our opportunity to be able to stand up for ourselves and speak for ourselves.

The assembled employees applauded and cheered at the conclusion of this statement. Gray also attended a general union meeting on February 15.

In addition, Gray was one of five group leaders [17] who, along with several other employees, met with the Union's

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[17] The others were Richard Johnson, Carolyn Smith, Barry Williams, and Sammie Williams.

International representative a number of times. At the first of these meetings, the Union's attorney advised the group leaders that in his opinion they were not supervisors and could continue to engage in union activities. At subsequent meetings, the group leaders and employees predicted how persons on the election eligibility list would vote and volunteered to attempt to influence employees to vote for the Union. The parties stipulated that Gray wore prounion T-shirts during the critical period.

Terry Henley: No findings on Henley's supervisory status have been made to date. He had been a second-shift group leader in the uniflux department since October 1978. He independently assigned and directed the work of the eight employees who worked in his department, and he testified that he had the authority to reject employees' work and make them redo it, and that he could allow employees to leave work early.

It is clear that the strongest discipline that Henley could administer on his own was an oral warning. He stated without contradiction that, when he felt that an employee deserved more than an oral warning, his foreman, Ronnie Wirt, became involved and investigated the situation to determine whether stronger discipline was warranted. For example, the only time that Henley had recommended that an employee be disciplined, Wirt did not issue a warning notice until he had verified Henley's account of the incident with group leader Joan Carson.

Henley testified that he did not consider himself to be a supervisor until January 29, when Wirt took over the second shift and altered its operation. Before then, Henley said, his foreman did not "back up" his recommendations regarding personnel actions. Nonetheless, we find that at all material times Henley was a supervisor within the meaning of the Act in view of his assignment and direction of employees.

Henley's union activities included attending "just about every one" of the general organizational meetings con-

ducted by the Union, asking employees to attend those meetings, "talking up and supporting" the Union, and telling employees that the Union would get them better benefits and stop favoritism by foremen. Henley, however, stated that he ceased his advocacy of the Union when he first perceived himself to be a supervisor, about 2 weeks before the election.

Barbara Jackson: Jackson is another group leader whose supervisory status was left unresolved by the Regional Director and the Board. As the group leader of about 10 employees on the second-shift assembly line, Jackson spent almost all her time engaged in manual labor and ordering parts. The employees on her line apparently did not require much supervision, but Jackson was responsible for running the line and directing the employees. Although we find that Jackson was a statutory supervisor because she exercised independent judgment in directing employees' work, Respondent has failed to sustain its burden of showing that she possessed any other supervisory authority during the critical period.

Jackson attended the Union's organizational meetings on January 21 and February 11 and 15. In addition, on one occasion, the Union's International representative took Jackson and three other employees to dinner at his expense.

Richard Johnson: There is no evidence concerning Johnson's duties or supervisory authority. Accordingly, we cannot find that he was a supervisor, and therefore his stipulated union activities—attending union meetings and consulting with union representatives—are immaterial to our decision.

Vernal Massey: Massey was a group leader in the mast arm department, which had about 10 employees. After he received the work schedule from his foreman, Ronnie Wirt, Massey assigned and directed employees in the cutting, bending, and welding of pipe. In this con-

nection, Massey selected employees to work overtime, obtained replacements for absentees, and permitted employees to leave work early. Because of his use of independent judgment in directing employees, we find that Massey was a supervisor.

With regard to indicia of major supervisory authority, Wirt cited incidents involving employees Dacus and McMahon as examples of Massey's recommendations that employees be given discipline stronger than an oral warning. Both of these incidents show that Massey did not have the authority effectively to recommend more than an oral warning. In the first case, Massey wanted Wirt to issue a written warning to Dacus about his absenteeism. Instead, Wirt simply spoke to Dacus and encouraged him to improve his attendance. Similarly, Wirt did not follow Massey's recommendation that McMahon be fired for neglecting his work, but instead merely talked to McMahon about his deficiencies and received his promise to do better in the future. Further, testimony designed to show that Massey had the authority to adjust employees' grievances only demonstrated that Massey acted sporadically as the conduit to Wirt for employee complaints about environmental conditions in the workplace. In each cited instance, Wirt resolved the problem after undertaking an independent investigation.

The Union conceded that Massey attended one union meeting on February 11, and Massey is included among those group leaders who, the parties stipulated, went to union meetings, encouraged employees to attend, and spoke out on behalf of the Union.

George McGhee: McGhee was group leader of four employees in the drill department, which also had Ronnie Wirt as its foreman. McGhee assigned work and ordered materials pursaunt to a schedule that he received each day from his superiors. In so doing, he was required to exercise independent judgment. Accordingly, we find that McGhee was a supervisor within the meaning of Section 2(11) of the Act.

When asked by Respondent's counsel to give examples of McGhee's authority to recommend discipline, Wirt cited incidents involving oral warnings to employees, which were given only after the foreman independently investigated the matter. Like Massey, McGhee could, without Wirt's prior approval, request employees to work overtime, obtain substitutes, and reject employees' work.

The parties stipulated that McGhee attended one union meeting during the critical period, but did not speak out on behalf of the Union.

John McNeely: In its Decision on Review, the Board found that McNeely was a statutory supervisor because he possessed the authority to adjust grievances, issue oral warnings, grant overtime, initial timecards, grant time off to employees within his own department, and reassign employees to different work areas as the need arose. In addition, the Board found that McNeely was required to enforce Respondent's rules regarding safety and to monitor the abuse of coffeebreaks and restroom privileges.

Respondent failed to show, however, that McNeely had the authority effectively to recommend any discipline stronger than oral reprimands. His foreman, Lee Shepherd, testified that oral warnings were not recorded, and that, if McNeely ever recommended that an employee be suspended or fired, no action would be taken until Shepherd and the personnel department made an investigation of the facts.

McNeely's only union activity during the critical period was his attendance at union organizational meetings on January 21 and February 15. The parties also stipulated that McNeely was among the group leaders who "spoke out in behalf of the union."

Jessie Merriweather: Merriweather worked in the metal finishing department with one other employee, Steve Rose. Merriweather did not receive a formal work schedule like the other group leaders, but instead dealt

directly with the two departments for which he performed services. His foreman, Ronnie Wirt, estimated that Merriweather spent about 50 percent of his time in manual labor, 20 percent ordering or moving materials, and the balance communicating with production employees about their needs.

Wirt described the metal finishing operation as a simple one, which did not require Merriweather to give much direction to Rose, who was an experienced employee. Merriweather "tells Rose what to wash and when to wash it," according to Wirt. Merriweather had the authority to excuse employees from overtime, but this was routine, inasmuch as employee requests to avoid overtime seldom were denied. He also could permit Rose to leave work early. There is no evidence that Merriweather could adjust grievances; he simply brought Rose's complaints to Wirt's attention, and then Wirt took the matter to higher management for resolution.

We find that because he exercised a degree of independent judgment in assigning work to Rose, and could orally reprimand him, Merriweather was a supervisor within the meaning of the Act. He had no major supervisory authority, however, to take or effectively recommend adverse action against an employee. For example, when Merriweather told Wirt that Rose should be fired for poor attendance, Wirt investigated Rose's record and decided that the strongest discipline that was warranted was a suspension, not discharge.

The parties stipulated that Merriweather's only union activity was attending one union meeting during the critical period, at which he did not speak out on behalf of the Union.

Jeannette Millington: The Board in its Decision on Review found that Millington was a supervisor, and therefore sustained the challenge to her ballot. As the sole group leader in the quality control department, Millington spent a majority of her time making sure that the de-

partment's 18 employees were working and that their equipment was properly set up. She trained employees, corrected their work, and possessed the authority to adjust grievances, approve overtime, grant time off, reassign employees to different work areas, issue oral warnings, and initial timecards. The Board concluded that Millington exercised a certain amount of independent judgment in the performance of the above duties.

Respondent did not present any evidence demonstrating that Millington effectively could recommend written reprimands or stronger discipline. Quality Control Foreman Lyvonne Young testified that, if Millington recommended to her that an employee be written up (which had not occurred), Young would "check it out first" before following the recommendation.

Millington went to general union meetings on January 21 and February 11 and 15. At one of these meetings, with about 40 employees present, she spoke out and complained about Respondent's treatment of a relative in a job assignment.

Carolyn Smith: Like Christine Brown, Smith was a group leader of 11 employees on an assembly line in the uniflux department. The Board affirmed the Regional Director's finding that Smith was a statutory supervisor, inasmuch as she responsibly directed the work of employees. With respect to major supervisory authority, Smith stated that she believed she had the authority to recommend that an employee receive a written reprimand, and that she was sure that her foreman, Elvin Knight, would follow her recommendation. Nevertheless, she had not recommended that an employee receive a written warning, and Respondent offered no evidence that she had the authority effectively to so recommend.[18] We find that Smith had the authority to give oral reprimands, but

[18] **The fact that Foreman Knight may have followed Smith's recommendation that an employee *not* receive a written warning does not establish that Smith effectively could recommend such warnings.**

could not issue or effectively recommend any stronger discipline.

In addition to attending two general union meetings, Smith was one of five group leaders who, along with other employees, met several times with the Union's International representative to discuss the election eligibility list. Smith, however, testified without contradiction that she never talked to employees in her department about the election.

Barry Williams and Sammie Williams: Contrary to the Regional Director, the Board on review found sufficient uncontroverted evidence to establish the supervisory status of group leaders Barry Williams and Sammie Williams. In addition to responsibly directing the work of receiving and warehouse employees, respectively, the two Williamses possessed the authority to adjust grievances, issue oral warnings, grant overtime, initial timecards, grant time off to employees within their own departments, and reassign employees to different work areas. Further, they were required to enforce Respondent's rules regarding safety and to monitor the abuse of coffeebreaks and restroom privileges.

It is clear from the testimony of both Williamses and their foreman, Lee Shepherd, that they had no authority effectively to recommend hiring, firing, layoff, recall, or discipline. Shepherd testified that, although he would give "some weight" to Sammie Williams' suggestion that an employee be disciplined, he would independently investigate the matter before implementing a written reprimand, suspension, or discharge.

Barry Williams attended two general union meetings during the critical period and met informally with union representatives several times to discuss the union sentiments of various employees. Williams volunteered to try to persuade employees to vote for the Union, and wore a prounion T-shirt to work.

Sammie Williams also attended general union meetings and the smaller meetings conducted by the Union's Inter-

national representative for about a dozen group leaders and employees. There is no evidence that he engaged in any other union activity.

Discussion and Conclusions

We have found that 12 of the 15 group leaders who engaged in union activity during the critical period were supervisors, and have assumed, for purposes of this proceeding, that Jo Ann Gray also was a supervisor. All 13 of these individuals exercised independent judgment in assigning and directing work; 7 had the authority to allow employees to leave work early and to approve overtime; and 4 also could adjust grievances.[19] None of these group leaders had the authority effectively to recommend hiring, firing, promotions, or written warnings. The most they could do was orally reprimand an employee and inform a foreman that an employee had committed an infraction or needed to improve his job performance. As mentioned above, these oral warnings were not recorded.

We must determine whether the group leaders' prounion activities reasonably could have coerced employees into supporting the Union out of fear of future retaliation. The court of appeals identified the key issue as being whether a prounion group leader might be able to recommend, if not actually cause, the dismissal or other adverse treatment of an antiunion employee, even if the true motive behind the recommendation could be disguised. We concluded that there was no danger that a prounion group leader bent on retaliation could accomplish that end, since the record amply demonstrates that no hiring, firing, promotions, or written reprimands were effected with respect to employees supervised by any of these 13 group leaders without an independent investigation of the matter by Respondent's foremen and person-

[19] Nothing in the record indicates that the grievance adjusting authority of these group leaders placed them in a position effectively to retaliate against employees.

nel office. The type of day-to-day supervisory authority possessed by these group leaders simply did not afford the opportunity for effective retaliation against antiunion employees. That a group leader may have been able to reprimand an employee orally for staying too long in the restroom or for working too slowly on the assembly line does not warrant a finding that the retaliatory potential of the group leaders was sufficient to make their involvement in the union campaign coercive to employees. Further, there is no evidence that any action was taken to make any employee fear possible retribution at a group leader's hands for failing to support the Union.[20] Accordingly, we affirm our earlier holding that the prounion statements and activities of the group leaders did not reasonably tend to coerce employees and impair the employees' freedom of choice so as to justify setting the election aside.

This result is not inconsistent with *Delchamps, Inc.*, 210 NLRB 179 (1974), and *Flint Motor Inn Company d/b/a Sheraton Motor Inn*, 194 NLRB 733 (1971), where the Board set aside elections based on supervisory involvement in union activities, even in the absence of threats to employees. In *Delchamps*, the Board found that the supervisors in question possessed the major supervisory authority, *inter alia*, to discipline employees,

[20] Respondent points to Jo Ann Gray's remarks at the February 11 union meeting as an example of the way in which a prounion group leader could retaliate against an employee. At that meeting, with about 100 employees present, Gray declared: "[E]verybody had better get out and vote for the union . . . The ones that don't vote for the union, don't come to me crying about your problems afterwards because I don't want to hear them." Respondent argues that this comment shows that Gray advised employees that she would not resolve their grievances if they voted against the Union. We read her statement as simply expressing her position that she would have no sympathy for those employees in the future who complained to her about being mistreated by the Company, but who were unwilling to unionize. In any event, Respondent failed to show that Gray had any authority to adjust grievances.

and effectively to recommend pay raises, transfers, promotions, and discharges, and that there was evidence that some of the supervisors actually hired and fired employees. Similarly, the supervisor whose union activities were found coercive in *Flint* was the chef, who had the authority to hire and discipline, and who supervised the entire complement of kitchen employees. None of the 13 group leaders at issue here had any of these indicia of major supervisory authority.

In sum, we hereby overrule Respondent's objections, and we reaffirm the Certification of Representative issued in Case 26—RC—5908 and our prior Order in Case 26—CA—8050.

ORDER

Pursuant, to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board reaffirms its Decision and Order issued in this proceeding on September 26, 1980 (reported at 252 NLRB 328) and hereby orders that the Respondent, ITT Lighting Fixtures, Division of ITT Corporation, Southaven, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth therein.

Dated, Washington, D.C. December 16, 1982

.....
JOHN H. FANNING, Member

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HOWARD JENKINS, JR., Member

.....
DON A. ZIMMERMAN, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

Case 26-CA-8050

ITT LIGHTING FIXTURES, DIVISION OF ITT CORPORATION and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

September 26, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

Upon a charge filed on September 20, 1979, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, herein called the Union, and duly served on ITT Lighting Fixtures, Division of ITT Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 26, issued a complaint on October 2, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 10, 1979, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or

[1] The certification was issued following an election conducted by the Board in Case 26-RC-5908. Official notice is taken of the record in the representation proceeding, Case 26-RC-5908, as the term

about August 6, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 9, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 3, 1979, counsel for the General Counsel filed directly with the Board a motion entitled "Motion to Transfer Case to the Board and for Summary Judgment." On December 18, 1979, the General Counsel moved to withdraw the motion because of the Board's pending review of the Regional Director's Decision in Case 26-RC-5908. On December 18, 1979, the Board granted the General Counsel's motion to withdraw the "Motion to Transfer Case to the Board and for Summary Judgment," and referred the case to the Regional Director for Region 26 for further appropriate action. On May 9, 1980, the Board issued its Decision on Review in Case 26-RC-5908,[2] affirming and adopting the Certification of Representative issued by the Regional Director in his supplemental decision of July 10, 1979. Thereafter, on June 23, 1980, the General Counsel filed a motion entitled "Motion to Re-File Motion to Transfer Case to Board and for Summary Judgment," with exhibits attached, alleging, *inter alia*, that by letter of June 3, 1980, Respondent refused to bargain with the Union. Subsequently, on June 30, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General

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"record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] 249 NLRB 441.

Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent asserts that the Regional Director's certification of a unit including certain employees classified as group leaders is erroneous inasmuch as all of its group leaders are supervisors within the meaning of Section 2(11) of the Act. Respondent admits in its answer that it has refused and continues to refuse to bargain with the Union.

The General Counsel contends that Respondent's answer raises no issues other that those fully considered and decided by the Board in the underlying representation proceeding, that Respondent is seeking to relitigate such issues, and that Respondent makes no claim that its defenses are based on previously unavailable evidence.

Our review of the record herein, including the record in Case 26-RC-5908, discloses that the Union filed a petition for an election on December 14, 1978. After a hearing on January 3, 1979, the Regional Director issued a Decision and Direction of Election, directing an election in a unit of production and maintenance employees and finding that the group leaders, alleged by Respondent to be supervisors, and by the Union to be employees, should vote subject to challenge.

An election was conducted on February 16, 1979, in which 175 votes were cast for the Union, and 153 against

the Union, with 34 challenged ballots, including those of the group leaders, a number sufficient to affect the results of the election. Respondent timely filed objections, alleging, essentially, that the group leaders were supervisors who should not have been allowed to vote by challenged ballot and whose preelection conduct in support of the Union interfered with employees' freedom of choice in the election. On February 28, 1979, the Regional Director for Region 26 issued a notice of hearing on the challenged ballots and objections to resolve the issues raised by Respondent's objections and by the challenged ballots. The Hearing Officer issued his "Report and Recommendations on Employer's Objections to the Conduct of the Election and to Conduct Affecting the Respondents of the Election and Challenged Ballots" on April 23, 1979, in which he recommended, *inter alia*, that the challenges to the ballots of the group leaders be sustained; that the challenge to the ballot of traffic control clerk Janet Cox be overruled; that Respondent's objections be overruled; and that a certification of representative issue. On July 10, 1979, the Regional Director issued a Supplemental Decision and Certification of Representative in which, *inter alia*, he adopted the Hearing Officer's findings that 11 of the group leaders were supervisors and that Respondent's objections were without merit; found 1 ballot void; sustained the challenge to Cox's ballot; and found it unnecessary to resolve the status of the remaining group leaders as their ballots were no longer determinative.[3]

On August 6, 1979, Respondent filed a request for review of the Regional Director's Supplemental Decision and Certification of Representative, alleging, *inter alia*, that the Regional Director erred in declaring a ballot void; sustaining the challenge to the ballot of Cox; overruling Respondent's objections; and failing to find all of the group leaders to be supervisors. Subsequently, on Novem-

[3] Thus, the revised tally of ballots shows 174 votes for and 153 against the Union, with 21 undeterminative challenged ballots.

ber 21, 1979, the Board granted Respondent's requset for review as to Cox as well as on the eligibility of the 20 group leaders on whose status the Regional Director found it unnecessary to pass.

Thereafter, on May 9, 1980, the Board issued its Decision on Review in Case 26-RC-5908 in which it overruled the challenge to Cox's ballot, and found that an additional four group leaders were supervisors within the meaning of Section 2(11) of the Act. However, as the unresolved challenged ballots and the unopened ballots (challenges to which had been overruled) were not determinative of the results of the election, the Board affirmed and adopted the Regional Director's Certification of Representative issued by the Regional Director. In view of the Board's Decision on Review, the Union, by letter of May 19, 1980, renewed its request to bargain. Respondent replied by letter of June 3, 1980, that it was unwilling to bargain on grounds that the activities of the group leaders had interfered with the election. On June 23, 1980, the General Counsel filed a motion entitled "Motion to Re-File Motion to Transfer Case to Board and for Summary Judgment."

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances

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[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[5]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a Mississippi corporation engaged in the manufacture of lighting fixtures and the operation of a warehouse at its Southaven, Mississippi, facility. In the course and conduct of its business, Respondent annually sells and ships from the Southaven facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Mississippi, and purchases and receives at its Southaven, Mississippi, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Mississippi.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer

[5] In its answer to the complaint, Respondent, in adffidition to denying the commission of any unfair labor practices, denies that the unit alleged in the complaint is appropriate for purposes of collective bargaining, that the Union was properly certified as collective-bargaining representative for the employees in said unit, or that the Union is now the representative of said employees. However, the Board, in its previously referred-to Decision on Review, disposed of these issues and they therefore cannot be relitigated herein. *Teledyne, Landis Machine*, 212 NLRB 73, 74, fn. 4 (1974). In its answer to the complaint Respondent alleges, *inter alia*, that Otto Payonzeck, alleged in the complaint to be plant manager, has the title of president and general manager, lighting fixtures division. We find that Payonzeck's title is immaterial to this proceeding and thus find that Respondent's allegation in that regard does not raise a litigable issue.

engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, is a labor organization within the meaning of Section 2(5) of the Act.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 10, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about August 6, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 6, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 6, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations de-

scribed in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. ITT Lighting Fixtures, Division of ITT Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,

is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees, including tool crib attendant, shipping department and warehouse receiving department employees and clerks, tool and die shop employees, mechanical lab technicians, electrical lab technicians, and quality control lab technicians, employed at Respondent's Southaven, Mississippi, location, and all employees employed at Respondent's warehouse located on Titan Drive in Memphis, Tennessee, including traffic control clerks, excluding office clerical employees, engineering department employees, technical employees, over-the-road truck-drivers, general foremen, foremen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 10, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 6, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, ITT Lighting Fixtures, Division of ITT Corporation, Southaven, Mississippi, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including tool crib attendant, shipping department and warehouse receiving department employees and clerks, tool and die shop employees, mechanical lab technicians, electrical lab technicians and quality control lab technicians, employed at the Respondent's Southaven, Mississippi, location, and all employees employed at the Respondent's warehouse located on Titan Drive in Memphis, Tennessee, including traffic control clerks, excluding office clerical employees, engineering department employees, technical employees, over-the-road truckdrivers, general foremen, foremen, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Southaven, Mississippi, and Memphis, Tennessee, facilities copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time production and maintenance employees, including tool crib attendant, shipping department and warehouse receiving department employees and clerks, tool and die shop employees, mechanical lab technicians, electrical lab technicians, and quality control lab technicians, employed by us at our Southaven, Mississippi, location, and all employees employed by us at our warehouse located on Titan Drive in Memphis, Tennessee, including traffic control clerks, excluding office clerical employees, engineering department employees, technical employees, over-the-road truckdrivers, general foremen, foremen, guards and supervisors as defined in the Act.

ITT LIGHTING FIXTURES, DIVISION
OF ITT CORPORATION

Case No. 26-RC-5908

ITT LIGHTING FIXTURES, DIVISION OF ITT CORPORATION and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner

May 9, 1980

DECISION ON REVIEW

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND TRUESDALE

Pursuant to a Decision and Direction of Election issued by the Regional Director for Region 26, an election by secret ballot was conducted on February 16, 1979,[1] among employees in the unit found appropriate therein. At the conclusion of the election, the parties were duly served with a tally of ballots which showed that 175 votes were cast for, and 153 against, the Petitioner, with 34 challenged ballots[2] which were sufficient in number to affect the results of the election. On February 21, the Employer timely filed objections[3] to con-

[1] All dates hereinafter are in 1979, unless otherwise indicated.

[2] Because of the conflicting evidence presented at the pre-decision hearing concerning the supervisory status of the Employer's 31 group leaders, the Regional Director in his Decision and Direction of Election allowed the group leaders to vote subject to challenge. As a result, the Board agent at the election challenged the ballots of these 31 group leaders. Additionally, a ruling by the Board agent that a certain ballot was void was contested by the Employer, and the Petitioner challenged the ballots of employees Curtis Bramlitt and Janet Cox on the grounds that they were office clerical employees.

[3] The Employer objected to the Regional Director's failure to find, in his Decision and Direction of Election, that the 31 group leaders were supervisors within the meaning of Sec. 2(11) of the Act and

duct affecting the results of the election and, on February 28, the Regional Director issued a notice of hearing on Challenged Ballots and Objections.

After a hearing on the challenges and objections, the Hearing Officer issued a report and recommendations in which he found that the 31 group leaders were statutory supervisors and recommended that the challenges to their ballots be sustained; that employees Bramlitt and Cox were plant clericals and recommended the challenges to their ballots be overruled;[4] and that the Employer's objections were without merit and recommended that they be overruled. As a consequence of his foregoing disposition of the various issues he recommended that the Petitioner be certified. Thereafter, the Employer and the Petitioner timely filed exceptions to the Hearing Officer's report.

On July 10, the Regional Director issued his Supplemental Decision and Certification of Representative. Contrary to the Hearing Officer, he found Cox to be an office clerical employee and, accordingly, sustained the challenge to her ballot.[5] He further found that the record evidence produced at the hearing on challenges and objections was sufficient to establish the supervisory status of only 11[6] of the group leaders but was insufficient and

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to his ruling that they be allowed to vote subject to challenge. Additionally, the Employer alleged as objectionable certain conduct engaged in by its group leaders on behalf of the Petitioner which included threatening and inducing employees to vote for the Petitioner.

[4] As indicated above, the Board agent declared a ballot void. The Hearing Officer agreed but also sustained a challenge to the ballot. The Regional Director adopted the Hearing Officer's findings on the voided ballot but overruled the challenge.

[5] The Petitioner did not except to the Hearing Officer's finding concerning the challenge to Bramlitt's ballot.

[6] The following group leaders were found by the Regional Director to be statutory supervisors: Christine Brown, Lonnie Edlin,

contradictory with respect to the status of the remaining 20 group leaders. Nevertheless, in view of his finding that Cox should be excluded from the unit, he concluded that the unresolved challenges to the ballots of the remaining 20 group leaders could not affect the election results [7] and, inasmuch as he agreed with the Hearing Officer that the Employer's objections were without merit, he issued a certification of representative. Thereafter, on August 3, the Employer filed with the Board a request for review of the Regional Director's supplemental decision.[8] On November 21 the Board granted the request, but only with respect to the issues of whether Cox was a plant or office clerical employee and whether the remaining 20 group leaders were supervisors within the meaning of the Act. The Board denied review with respect to the other issues raised by the Employer.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Regional Director's supplemental decision in light of the exceptions for which review was granted and the parties' briefs and hereby adopts the Regional Director's findings and conclusions as modified below.

Richard Hayes, Carolyn Smith, Billie Hamilton, Marie Mason, Shirley Spencer, Gilbert Vickers, Rebecca Jo Hamilton, Bobby Hobbs, and Joan Carson.

[7] Thus the vote would be 175 for the Union, 153 against, with Bramlitt's valid ballot uncounted and 20 unresolved challenges.

[8] The Employer requested review of the Regional Director's failure to find that all group leaders were supervisors, to his finding that Cox was an office clerical employee, to the finding concerning the void ballot, and to the objections. Additionally, the Employer requested that the Board correct the Regional Director's failure to direct that Bramlitt's challenged ballot be opened and counted.

Status of Employee Cox

Contrary to the Regional Director, we find that Cox is a plant clerical rather than an office clerical employee and should be included in the bargaining unit. Thus, the record establishes, and the Regional Director found, that Cox, who is classified as a traffic control clerk, spends approximately 75 percent of her working time processing inventory work which includes initiating and/or recording everything done by the warehouse employees, who form part of the bargaining unit. Cox works in an office separate from that of the Employer's other clericals. Her office has a sliding glass window through which she and warehouse personnel, who frequently include unit employees, exchange orders, bills of lading, stock tickets, and other items. The record further establishes that, on alternate days, Cox goes out to the warehouse floor, where other unit employees work, to pick up stock tickets.

From the above facts, it is clear to us that Cox's duties are an integral part of the warehouse operation and that said duties frequently bring her into contact with unit employees. Additionally, Cox receives the same intermediate supervision, works the same hours, and shares the same facilities as warehouse employees. Moreover, the record is void of any evidence to indicate that Cox has any significant contact with other office clerical employees. We further note that the Petitioner and the Employer had agreed that traffic control clerks, which is Cox's classification, should be included in the bargaining unit. In view of the above, we find that Cox is a plant, i.e., here a warehouse, clerical employee and is included in the unit. Accordingly, we overrule the challenge to her ballot.

Status of the Group Leaders

We agree with the Regional Director that the 11 group leaders (see fn. 6, *supra*) are supervisors within the meaning of Section 2(11) of the Act. However, contrary to the Regional Director, we find that there is

sufficient uncontradicted evidence in the record to establish the supervisory status of group leaders Jeanette Willington, Sammie Williams, Barry Williams, and John McNeely.

According to the uncontradicted testimony of Quality Control Supervisor Lyvonne Young, group leader Millington spends approximately 30 percent of her working time doing quality control inspections and tests. The remainder of her time is spent making sure that the 18 employees in the quality control department are working and that their equipment is set up for testing and inspecting and generally in meeting their everyday work needs. As the sole group leader in that department, Millington trains employees and corrects their work. Furthermore, while she lacks the authority to hire, fire, promote, or grant wage increases, she nevertheless possesses the authority to adjust employee grievances, approve overtime, grant time off, reassign employees to different work areas, issue oral warnings, and initial timecards. The record reveals that Millington exercises a certain amount of independent judgment in the performance of her above-described duties. On the basis of the above facts, we conclude that Millington is a supervisor as defined in the Act and therefore sustain the challenge to her ballot.

Similarly, the Employer's raw material warehouse foreman, Lee Shepherd, testified without contradiction that group leaders Sammie and Barrie Williams and John McNeely, who respectively are in charge of the inside warehouse day-shift employees, receiving area employees and inside warehouse night-shift employees, also possess the authority to adjust grievances, issue oral warnings, grant overtime, initial timecards, grant time off to employees within their own departments, and reassign employees to different work areas as the need arises. Furthermore, these group leaders are required to enforce the Employer's rules regarding safety and to

monitor the abuse of coffeebreaks and restroom privileges; depending on the seriousness of the violation, they may, at their discretion, issue oral warnings to employees. Thus, it is clear from the above that these group leaders are required to exercise a certain degree of independent judgment in the performance of their duties. Accordingly, on the basis of the above facts, we find group leaders Sammie Williams, Barrie Williams, and John McNeely to be supervisors within the meaning of Section 2(11) of the Act and shall therefore sustain the challenges to their ballots.

As a consequence of our foregoing findings there remain only 16 unresolved challenged ballots and the as yet uncounted ballots of Cox and Bramlitt. However, in view of the Union's having received a 22-vote majority of the ballots counted, these 18 ballots cannot affect the election results and, consequently, further action with respect to them is unnecessary. We therefore, affirm and adopt the Certification of Representative issued in favor of the Petitioner by the Regional Director in his supplemental decision.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twentieth day of September, one thousand nine hundred and eighty-three.

No. 83-4002, 83-4020

ITT LIGHTING FIXTURES, DIVISION OF ITT CORPORATION,
Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Intervenor.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for Intervenor, International Union et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED,

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the

panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
Clerk

by /s/ Francis X. Gindhart,
FRANCIS X. GINDHART
Chief Deputy Clerk

Office - Supreme Court, U.S.
FILED
FEB 23 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

ITT LIGHTING FIXTURES, INC. DIVISION OF ITT CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Should this Court grant a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit where, in the proceedings below:

1. The Court of Appeals held that the National Labor Relations Board's findings[1] that Respondent[2] unlawfully refused to bargain with Petitioner were not supported by substantial evidence;[3]

2. The Court remanded the case to the Board for further findings as to whether the Employer's groupleaders were supervisors and, if so, whether their pro-union activity could have effectively affected the votes of employees;

3. On remand the Board found such groupleaders to be supervisors, but failed to evaluate the impact of their pro-union activity on the votes of employees as directed by the Court of Appeals; and

4. Subsequently, the Court of Appeals again refused to enforce the Board's Order.

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[1]Hereinafter "the Board."

[2]ITT Lighting Fixtures, Inc., Division of ITT Corporation (hereinafter "the Company" or "the Employer").

[3]International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (hereinafter "Petitioner" or "the Union").

CORPORATION LIST

Respondent ITT Lighting Fixtures, Inc. is a Division of ITT Corporation ("ITT"). ITT or its subsidiaries own more than twenty percent (20%) of the common stock of the following publicly-traded domestic corporations: Piper Jaffray, Inc. (25%); Thompson, McKinnon, Inc. (25%); and Wheat First Securities, Inc. (25%).

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National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.*:

§2(11) 2
§8(a) (1) 3, 21
§8(a) (5) 2, 3

No. 83-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

ITT LIGHTING FIXTURES, INC. DIVISION OF ITT CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, ITT Lighting Fixtures, Inc., Division of ITT Corp., respectfully prays that this Honorable Court *deny* a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, denying enforcement of the Board's Order[1] finding that the Company unlawfully refused to bargain[2] with the Union, and remanding the case to the Board for findings as to whether the Employer's groupleaders were supervisors,[3] and if so, whether their pro-union activity could have effectively affected the votes of employees, is reported at 658 F.2d 934 (2d Cir. 1981).[4] The Board's subsequent Supplemental Decision and Order is reported at 265 NLRB No. 188 (1983).[5] The Court of Appeals' second opinion in this proceeding denying enforcement of the Board's Order is reported at 712 F.2d 40 (2d Cir. 1983).[6]

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[1]252 NLRB 328 (1980), Petitioner's Appendix (hereinafter "Pet. App.") 51a-62a.

[2]In violation of §8(a) (5) of the National Labor Relations Act (hereinafter "the Act"), as amended, 29 U.S.C. §151 *et seq.*

[3]Within the meaning of §2(11) of the Act.

[4]Pet. App. 10a-30a.

[5]Pet. App. 31a-50a.

[6]Pet App. 1a-9a. The Board's unfair labor practice Orders cited above were preceded by its Decision on Review in the representation case related to this matter. Said Decision on Review is reported at 249 NLRB 441 (1980), Pet. App. 63a-68a. In turn, the Board's Decision on Review was preceded by the Regional Director's January 22, 1979 Decision and Direction of Election in Case No. 26-RC-5908; by the Hearing Officer's April 23, 1979 Report and Recommendations on the Employer's election objections; and by the Regional Director's July 10, 1979 Supplemental Decision and Certification of Representative. These Decisions by the Board's finders of fact are reproduced in Respondent's separately bound Appendix (hereinafter "Res. App.") at 1a-6a, 7a-21a, and 22a-34a, respectively.

STATEMENT OF THE CASE

I.
The Initial Proceedings Before The Board

Pursuant to an election petition filed by the Union, the Board's Regional Director conducted a hearing after which he determined that the Employer's 31 groupleaders (alleged to be supervisors by the Company) would be allowed to vote by challenged ballot. Pet. App. 11a-12a, Res. App. 6a. Therefore, the Employer was effectively precluded from "interfering with [the groupleaders'] pro-union campaign activities for fear that such interference would constitute an unfair labor practice." Pet. App. 26a. Following the election at its facilities, the Employer filed objections contending *inter alia* pro-union election interference by many of its groupleaders. In subsequent proceedings the Board concluded that half of the groupleaders were supervisors, but because they were found to be "minor" supervisors, the Employer's objections were overruled. Pet. App. 20a-21a, 67a-68a. Thereafter, the Employer refused to bargain in order to test the Union's certification and the Board (252 NLRB 328 (1980), Pet. App. 51a-62a) found the Employer's refusal to be in violation of §§8(a) (5) and (1) of the Act. The Employer then filed a Petition for Review with the Second Circuit Court of Appeals.

II.
The First Decision Of The Court Of Appeals

In its initial review of the record and proceedings in this case,[7] the Court of Appeals identified the issue as being:

> whether the pro-union statements and activities of many of the Company's groupleaders impaired the employees' freedoms of choice in the election so as to justify setting the election aside. Pet. App. 14a.

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[7] 658 F.2d 934 (2d Cir. 1981), Pet. App. 10a-30a.

In this regard, the court noted that:

> It is well-established that the participation of a supervisor in a union election may in *some* circumstances so undermine the employees' freedom of choice as to warrant setting the election aside. Pet App. 15a (emphasis supplied).

However, the court also recognized that supervisory pro-union activity is not *per se* grounds to set aside an election in every case. Thus, the court expressly found that:

> it is well-settled that an election is not per se invalid merely because there was some pro-union activity on the part of a supervisor. Rather, there must be a showing that the supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election. Pet. App. 16a.

The Court of Appeals then analyzed Board precedent involving the question of pro-union supervisory election interference,[8] and noted that in setting aside such elections, the Board had found that it was not "always necessary that the pro-union supervisor *threaten* to use his supervisory powers in retaliation against an employee who disfavors the union." Pet. App. 17a (emphasis supplied). Rather, in cases where there is no substantial evidence of overt threats by pro-union supervisors:

> the Board would appear to look to two factors in determining whether pro-union supervisory conduct had a coercive effect upon employees: (1) the degree of supervisory authority and (2) the extent, nature and openness of the pro-union activity. Pet. App. 16a.

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[8] *Delchamps, Inc.*, 210 NLRB 179, 180 (1974); *Flint Motor Inn Co. d/b/a Sheraton Motor Inn*, 194 NLRB 733, 734 (1971).

After analyzing extensively the evidence regarding the groupleaders' stipulated "substantial" pro-union activity in this case,[9] and reviewing the Board's own findings with respect to the supervisory powers possessed by these groupleaders (Pet. App. 17a-22a), the Court of Appeals concluded that the Board failed to undertake an evaluation of the record as a whole, *i.e.*, the Board failed to examine the groupleaders' supervisory powers and their pro-union activity *vis-a-vis* the votes of employees. Pet. App. 20a-22a.

Thus, the court found that the Board's factual findings did not go far enough, and that its conclusions were not based upon:

> essential findings relative to two issues: first, whether, based upon the evidence and findings of fact reached

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[9]With respect to the groupleaders' pro-union election campaign activity, there was both testimony from witnesses and a detailed stipulation presented at a post-election hearing on challenged ballots and objections ordered by the Board's Regional Director. Briefly summarized, the undisputed testimony and the factual stipulation showed that approximately one-half of the Employer's 31 groupleaders played a significant role in the Union's organizing effort, beginning with the commencement of the campaign, and continuing up to (and beyond) the actual election. Groupleaders actively and continuously supported the Union in every possible dimension: (1) by constantly urging employees to vote for the Union; (2) by attending union meetings and urging employees to attend; (3) by soliciting and collecting union authorization cards; (4) by openly wearing clothing items containing pro-union slogans; and (5) by making impassioned speeches on behalf of the Union at several Union-sponsored meetings (attended by 40 to 100 rank-and-file employees of the Company). Pet. App. 17a-19a.

Not only were the groupleaders actively and continuously involved on behalf of the Union, but also they actually spearheaded the Union's organizational campaign. Thus, over forty percent (40%) of the Union's trusted in-plant organizing committee consisted of groupleaders. Pet. App. 18a-19a. There were 12 persons on this committee, five of whom were groupleaders. Significantly, the Union's attorney was present at one meeting of the organizing committee, and advised the groupleaders that, in his opinion, they were not supervisors, and therefore they could continue to engage openly in pro-union activity. Pet. App. 18a.

> thereon, the groupleaders or any of them who engaged in pro-union activity during the critical period were "supervisors," setting forth the criteria for such; and then, if so, whether their pro-union activity could effectively affect the votes of employees. By only looking at the groupleaders' challenged ballots the Board has thus far avoided the issue before it—that of whether any of the 175 ballots cast for the Union were affected by the groupleaders' conduct. Pet. App. 23a.

For these reasons, and also because the Board had failed "to either distinguish or reconcile the record before it in this case with its decisions in the similar cases of *Delchamps, Inc., supra,* and *Flint Motor Inn . . . ,supra"* (Pet App. 27a), the court concluded that:

> Due to the lack of specific findings and articulated reasons for the distinction between this case and the cases of *Delchamps* and *Flint,* the Board's action cannot properly be reviewed by this Court. Pet. App. 29a-30a.

Finally, although the court stated that if it were the decision-maker in the case it might find merit to the Employer's election objections based upon pro-union supervisory interference, it recognized that this determination "must initially lie with the Board." Accordingly, the court remanded the matter to the Board "for further proceedings and action in the light of the content of this opinion." Pet. App. 30a.

III.
The Board's Decision On Remand[10]

On remand from the Court of Appeals, the Board acknowledged (and agreed with) the court's finding that "an election is not *per se* invalid merely because there was some pro-union activity on the part of a supervisor." The Board itself then expressly

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[10]265 NLRB No. 188 (1983), Pet. App. 31a-50a.

stated that, *even where the pro-union supervisors have made no threats of retaliation,* their conduct may nevertheless tend to coerce employees' votes in an election. The Board conceded that, in the absence of threats, it examines *two* factors in determining whether there has been election interference by pro-union supervisors: "(1) the degree of supervisory authority, *and* (2) the extent, nature, and openness of the prounion activity." Pet. App. 34a (emphasis supplied).

The Board then announced that:

> We view it as the law of the case, and as the proper statement of the law, that a group leader is a major supervisor only if he possesses the authority to hire, fire, promote, or issue written warnings on his own volition, or has the authority effectively to recommend such action. Pet. App. 35a.

While the Court of Appeals found there was "voluminous testimony" in the record with regard to the groupleaders' "authority effectively to recommend hiring, firing, promotions, or written warnings," in its Supplemental Decision the Board dismissed this finding of the court by stating that "said testimony pertains almost exclusively to groupleaders who did not engage in union activity." Accordingly, although its finders of fact had concluded that *all* groupleaders possessed similar powers,[11] the Board found that the supervisory authority of the 16 groupleaders who *refrained from* pro-union activity was "irrelevant to our decision here." Pet. App. 35a-36a. In addition, the Board opined that the "voluminous testimony" referred to by the court:

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[11]The Board's Hearing Officer in the proceedings below found that there was "little real dispute among the witnesses" and that "all groupleaders have essentially the same employment status, responsibility, and conditions of employment." Res. App. 12a-13a. After the Employer filed exceptions to the Hearing Officer's Report and Recommendations, the Regional Director independently reviewed the evidence and agreed that all of the groupleaders had "similar duties and responsibilities." Res. App. 25a.

> must be viewed in light of the well-established principle that the authority effectively to recommend generally means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation ultimately is followed. Pet. App. 36a (footnote omitted).[12]

As stated above, in its Supplemental Decision the Board initially recognized that, *in addition* to determining whether the groupleaders were supervisors, it *also* was required to evaluate "the extent, nature, and openness of the prounion activity." Pet. App. 34a. However, in the conclusionary portion of its Decision the Board stated that *it must only determine* "whether the group leaders' pro-union activity reasonably could have coerced employees into supporting the Union out of fear of future retaliation." Pet. App. 48a. Since the Board found that none of the pro-union groupleaders "had the authority effectively to recommend hiring, firing, promotions, or written warnings," (Pet. App. 48a) it stated that:

> The type of day-to-day supervisory authority possessed by these group leaders simply did not afford the opportunity for effective retaliation against anti-union employees. Pet. App. 49a.

Accordingly, the Board overruled the Company's election objections and reaffirmed its Certification of Representative. Pet. App. 50a.

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[12]Thereafter, in its Supplemental Decision the Board undertook an evaluation of the record as it specifically related to each of the 15 groupleaders who actually engaged in pro-union election campaign activity. The Board found that there was insufficient evidence for it to make a supervisory finding with respect to two such groupleaders. Regarding 12 of these pro-union groupleaders, the Board found that they were supervisors, but "minor" ones. In the case of one additional pro-union groupleader (Jo Ann Gray) the Board said there was conflicting evidence as to her supervisory duties, but assuming "for purposes of this proceeding" that Gray also was a supervisor, she too was "minor." Pet App. 37a-48a.

IV.
The Second Decision Of The Court Of Appeals Denying Enforcement Of The Board's Order

Shortly after the Board's Supplemental Decision and Order discussed above, the Company filed its second Petition for Review with the Court of Appeals. It is from this July 18, 1983 decision,[13] again denying enforcement of the Board's Order, that Petitioner is seeking a Writ of Certiorari. Initially, the court noted in its decision that "this marks the second appearance of this case before this court," that the court's prior decision "fully details the factual background," and that the court would "assume familiarity with its prior decision and [will herein] recount only the details." Pet. App. 2a.

The court then repeated that it had remanded the case to the Board for, *inter alia*, its evaluation of the "extent, nature and openness of the [groupleaders'] pro-union activity," and for findings regarding whether the groupleaders' "pro-union activity could effectively affect the votes of employees." Pet. App. 5a. The court stated that, upon remand:

> The question of law to be decided was whether the groupleaders' conduct reasonably tended to have a coercive effect on the employees so that it was likely to have impaired their freedom of choice in the election. Pet. App. 5a.

The court then turned to the Board's Supplemental Decision and Order and noted that, contrary to the *Board's* interpretation of the court's first decision:

> this court on the prior review did not approve an *automatic* conclusion that a supervisor's conduct might or might not affect voting based on a distinction between

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[13] 712 F.2d 40 (2d Cir. 1983), Pet. App. 1a-9a.

> "major" and "minor" supervisory authority. Pet. App. 6a (emphasis supplied).

The court emphasized that it was immaterial what "labels" the Board placed upon the groupleaders in this case. Rather, the court:

> wanted to know the criteria developed by the Board for determing whether a supervisor was "major" or "minor," and whether the exercise of a supervisor's authority could have an impact on the laboratory condition for voting. The determination cannot be made, as the Board has done, simply by labeling a supervisor as "minor"; instead there must be consideration of both the extent of the supervisor's authority and the extent of his pro-union activity. Pet. App. 6a-7a.

The court criticized the Board's restrictive interpretation of the authorities necessary to make a person a "major" supervisor,[14] and noted that: "Nowhere in this Court's prior opinion was such a ruling made." Pet. App. 7a. Furthermore, the court found that the Board's distinction between "major" and "minor" supervisory status took into account *only* the power to recommend *adverse* action. Missing from the Board's analysis was the power to *reward* which "can be just as coercive in the election process as the authority to issue written warnings." Pet. App. 7a. The court noted that in past decisions[15] the Board had found supervisory powers to reward employees to be "indications of significant authority," and that the record in the instant case demonstrated that the Employer's groupleaders possessed an abundance of such responsibilities. Pet. Ap. 7a-8a.

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[14] *I.e.*, only the power to hire, fire, promote, issue written warnings, or effectively to recommend such actions.

[15] *Delchamps, supra,* and *Flint Motor Inn Co., supra.*

Thereafter, the court emphasized the closeness of the vote in the election[16] and stated that: "The question is whether these [pro-union] supervisors might have affected the result because of the nature of their authority and the extent of their union activity." Pet. App. 8a. Because the Board failed to make such an analysis on remand, the court did so itself. However, instead of discussing the authorities and activities of *all 15* pro-union groupleaders, by way of illustration, the court focused on five groupleaders, who supervised a combined total of 51 employees.

Those groupleaders specifically mentioned by the court "possessed more than minimal authority to reward employees." Pet. App. 8a. One of them (Joan Carson) could select employees for overtime and issue oral warnings. With respect to Carson's authority to cause the issuance of written warnings, in its Supplemental Decision and Order the Board denigrated such evidence because her superior "would first check the employee's file to see if Carson had [previously] issued an oral warning." Pet. App. 9a. In disagreeing with the Board's analysis of Carson's power to recommend adverse action, the court noted that: "The Act does not preclude supervisory status simply because the recommendation is subject to a superior's investigation." Pet. App. 9a.

Based upon its representative sample of five pro-union groupleaders (out of the total of 15) the court concluded that it "has been shown that 51 employees could possibly have been influenced by the pro-union activity of five of the groupleaders." Accordingly, the court concluded that it could not be said that

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[16]At the February 16, 1979 election, there were 175 ballots cast in favor of the Union, and 153 against it. Included in the total of 34 challenged ballots (which were determinative of the election results) were the 31 ballots cast by groupleaders. Pet. App. 63a. Accordingly (as found by the Court of Apeals), a switch in votes by as few as 12 employees in a total unit of approximately 380 would have resulted in the Union receiving *less* than a majority of the valid ballots cast. Pet. App. 8a.

the election was held under the required laboratory conditions. For this reason, and because "the Board has failed to avail itself of two opportunities to demonstrate the validity of its order" the court vacated it. Pet. App. 9a.

SUMMARY OF ARGUMENT

The Employer respectfully submits that there exist a number of reasons why the Union's Petition for a Writ of Certiorari should be denied. Preliminarily, the Employer notes that in its Petition the Union makes only *passing* reference to the Court of Appeals' first decision[17] denying enforcement to the Board's Order in this case. Indeed, the Union's Petition devotes a scant *one sentence* to that opinion of the court (Petition p. 4) and discloses *none* of the bases for the court's remand. Notwithstanding the fact that in the court's *second* opinion in this case[18] it expressly referred to the first and "assume[d] familiarity with its prior decision," the totality of the Union's argument before this Court is based upon the Court of Appeals' decision *following* its remand to the Board. When the Court of Appeals' second opinion in this proceeding is analyzed in light of both its first decision and the Board's Supplemental Decision on remand, it becomes apparent that the Union's Petition mischaracterizes the court's holding and that a Writ of Certiorari is not warranted.

Furthermore, the Union is incorrect in its assertion that there is a conflict between the decisions of the Court of Appeals in the instant matter and those of other Circuits. Also without merit are the Union's claims that this case presents recurring questions and issues of unusual practical importance. Rather, as detailed below, the cases at bar satisfy *none* of the Supreme Court's standards for granting Certiorari.

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[17] 658 F.2d 934 (2d Cir. 1981), Pet. App. 10a-30a.

[18] 712 F.2d 40 (2d Cir. 1983), Pet. App. 1a-9a.

ARGUMENT

I

The Decisions Of The Court Of Appeals Are Within The Judicial Mainstream

A. The First Decision Of The Court Of Appeals

Contrary to the assertions in the Union's Petition, the court below *did not* make a *per se* finding that pro-union supervisory campaign activity was sufficient grounds to set aside this (or any other) election. Indeed, the court specifically stated that, while such supervisory activity may in *some* circumstances warrant overturning an election, "it is well settled that an election is not per se invalid" for that reason alone. Pet. App. 15a. "Rather, there must be a showing that the supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election." Pet. App. 16a. Accordingly, as discussed below, the Second Circuit's view of the applicable law in this matter *does not* differ from those cases asserted by Petitioner as being "in conflict" with the instant decisions.

Furthermore, Petitioner erroneously argues that the Court of Appeals' second decision is "in conflict" with certain cases cited by Petitioner because the instant case did not involve "express or tacit threats or promises of benefit." Petition p. 7. Contrary to this assertion, in its decisions the court merely observed that in prior cases *the Board itself* has set aside elections in the absence of overt threats by pro-union supervisors.[19]

In its first decision in this case, the court's disagreement with the Board was that it had theretofore avoided applying its own standards of review in cases of this nature, *i.e.*, the Board had not

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[19]Significantly, in its Supplemental Decision the Board *agreed* with the court's view of the law in this respect, a critical point which is conspicuously absent from the Union's Petition.

determined whether the pro-union groupleaders were supervisors, and if so, whether their activity impacted upon the election. Pet. App. 23a. Instead, the Board had merely labeled the groupleaders "minor" supervisors, totally disregarded their stipulated substantial pro-union activity, and failed to evaluate the impact of that activity on the voters. Moreover, the Board also failed to explain its departure herein from the precedent which it established in the similar cases of *Delchamps, Inc., supra* and *Flint Motor Inn, supra.*

Clearly, under these circumstances the Court of Appeals *would have been* completely justified in concluding that the Board's findings were not supported by substantial evidence on the record as a whole,[20] and on that basis denying enforcement outright. Instead, the court remanded the case to the Board with *specific* instructions for it to determine the supervisory status of the employer's groupleaders, *and then* to analyze their extensive pro-union activity and determine whether such activity "could effectively affect the votes of employees." Pet. App. 23a.

B. The Board's Decision On Remand

As discussed above, in its Supplemental Decision and Order the Board *agreed* with most of the court's critical legal analyses in this matter. Thus, the Board reaffirmed its prior holdings that overt threats of retaliation by pro-union supervisors are not the *sine qua non* in election interference cases. The Board stated that in elections lacking evidence of such threats, it looks to *two* crucial points: "(1) the degree of supervisory authority, *and* (2) the extent, nature, and openness of the prounion activity." Pet. App. 34a (emphasis supplied). However, at the conclusion of its Supplemental Decision the Board *contradicted* this initial finding and held that, because it had labeled the groupleaders as "minor" supervisors, it was *per se unnecessary to consider their pro-union activity at all.*

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[20] *See Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

With regard to its supervisory findings on remand, the Board made a number of egregious errors. Two examples illustrate this point. Thus, the Board conceded that there was record evidence that pro-union groupleader Jessie Merriweather possessed the "major" supervisory authority effectively to recommend written warnings. Likewise, there was testimony that pro-union groupleader George McGhee had the "major" supervisory authority effectively to recommend discharge, suspension, or layoff. Pet. App. 35a, n. 9. Yet incredibly, *later* in its Supplemental Decision the Board *again* discussed Merriweather and McGhee and (contradicting its earlier findings) concluded that *neither* groupleader possessed "major" supervisory authority. Pet. App. 43a-45a, 48a.

Furthermore, central to the Board's analysis of the supervisory powers possessed by all 15 pro-union groupleaders in this case, was its observation that it was applying a so-called "well established principle" that the authority effectively to recommend "means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation ultimately is followed." Pet. App. 36a. Following this initial premise, the Board denigrated the authorities of the pro-union groupleaders because their recommendations were subject to review by their superiors. However, the "well established principle" advanced by the Board in *this* case is *totally at odds* with its decisions in *previous* cases holding that "the mere fact that such recommendations are subject to review and independent investigation does not necessarily prevent them from being given *substantial weight* as *effective* recommendations."[21]

In conclusion, after stating the *correct* legal standard that in cases involving non-threatening supervisory election campaigning an evaluation of "the extent, nature, and openness of

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[21] *Pittsburgh Plate Glass Co.*, 115 NLRB 976, 977 (1956) (emphasis supplied).

prounion activity" must be made, the Board then: (1) formulated a *new* highly restrictive definition of the powers necessary to make an individual a "major" supervisor; (2) focused *only* on the supervisory powers to recommend *adverse* action, and completely disregarded the voluminous record testimony that these groupleaders had potentially coercive authority to grant or deny *rewards;*[22] (3) made internally inconsistent findings regarding the "major" supervisory authority possessed by two of the pro-union groupleaders; (4) ignored or misinterpreted the record evidence with respect to many other groupleaders;[23] and (5) *misstated its own legal principles* on the issue of the effectiveness of supervisory recommendations. Then, without even an attempt to determine what impact the groupleaders' campaign had upon the election,[24] the Board reaffirmed its earlier order in this case.

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[22]Clearly, the power to grant or deny rewards (which all of the Employer's groupleaders possessed) can be highly coercive. Thus, a pro-union groupleader bent on retaliation could coerce employees by: (1) denying them permission to have time off from the job; (2) refusing to assign overtime to dissident employees; (3) adjusting their grievances unfairly and arbitrarily; (4) assigning them to disagreeable jobs; (5) transfering them to undesireable departments; etc.

[23]As discussed above, while the Board's finders of fact concluded that all groupleaders herein had similar duties and responsibilities (note 11 *supra*), the Board found that the supervisory authorities of the 16 groupleaders who *did not* engage in pro-union activity were "irrelevant." Pet. App. 35a-36a. By totally ignoring the *substantial* authorities of these 16 "irrelevant" groupleaders, the Board on remand committed a number of fundamental errors in its supervisory analysis. For example, at the hearing a rank-and-file employee (as well as two members of management) testified without contradiction that pro-union groupleader Gray exercised the same authority as groupleader Robert Johnson, whom the Board found to be "major" but "irrelevant" because he had not engaged in pro-union activity. The Board failed to consider this critical testimony with respect to Gray.

[24]As the Board was specifically instructed to do in the court's remand.

C. The Court Of Appeals' Second Decision

As stated, in the Court of Appeals' second decision in this case it expressly adopted by reference the findings in its first opinion. Pet. App. 2a. The court emphasized that its remand instructions to the Board had been quite specific, and that the Board was required to analyze whether the "groupleaders' conduct reasonably tended to have a coercive effect on the employees so that it was likely to have impaired their freedom of choice in the election." Pet. App. 5a.

Contrary to the Union's contentions in its Petition, the court *did not* outright reject the Board's position that in election interference cases it might make a difference that a supervisor was "major" or "minor." Indeed, the court merely stated that in its first decision it did not approve of the Board's *"automatic"* conclusion that such a distinction "might or might not affect voting." Pet. App. 6a (emphasis supplied). In this regard, the court said that it was not interested in convenient "labels" the Board might use on remand, and that "instead there must be consideration of both the extent of the supervisor's authority *and* the extent of his pro-union activity." Pet. App. 7a (emphasis supplied).

The court concluded that the Board's Supplemental Decision was not supported by substantial evidence for two fundamental reasons. First, the Board only considered the groupleaders' authority to effect *adverse* actions against employees, and did not take into account the voluminous record testimony that they also could grant or withhold *rewards*. Second, with respect to the groupleaders' power effectively to recommend adverse actions, the Board found such authority to be lacking herein because the groupleaders' recommendations were customarily reviewed by higher authority. However, as discussed above (and as found by the court), it has long been established that: "The Act [as well as Board precedent] does not preclude supervisory status simply

because the recommendation is subject to a superior's investigation." Pet. App. 9a.

Finally, because on remand the Board had failed totally to follow instructions from the court to evaluate the impact of the substantial pro-union supervisory activity upon this extremely close election, the court did so itself. Using a representative sample of five pro-union groupleaders, the court concluded that their activity could have influenced a sufficient number of votes as to warrant denying enforcement of the Board's Order, particularly since "the Board has failed to avail itself of two opportunities" to demonstrate its validity. Pet. App. 9a.

D. The Court's Decisions Herein Are Not in Conflict With Decisions Of Any Other Circuit

As the Court of Appeals pointed out in *NLRB v. Manufacturer's Packing Co.*, 645 F.2d 223 (4th Cir. 1981):[25]

> whether pro-union supervisory activity is sufficient to overturn an election *depends on the facts and circumstances of each case. Id.* at 225-26 (emphasis supplied).

Therefore, as the following brief summary of the cases cited by Petitioner discloses, the particular facts and circumstances in the instant matter constitute no "conflict" with any other Circuit.

1. In *Worley Mills, Inc. v. NLRB*, 685 F.2d 362 (10th Cir. 1982), as here, the court held that pro-union supervisory involvement is not *per se* a reason to invalidate an election. *Id.* at 365. However, there the court enforced the Board's Order because the pro-union activity of three supervisors was minimal at best, and the activity of one of them *ceased* prior to the election. *Id.*

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[25]A case which the Union relies on in its Petition (pp. 9-10).

2. In *NLRB v. Northeastern University*, 707 F.2d 15 (1st Cir. 1983), the single pro-union supervisor "later disavowed the union." *Id.* at 19.

3. In *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062 (4th Cir. 1982), the pro-union activities "occurred two or three months before the election." *Id.* at 1069.

4. In *NLRB v. Manufacturer's Packing Co.*, 645 F.2d 223 (4th Cir. 1981), the pro-union supervisory activities were "minimal," and *ceased completely* "a full seven weeks prior to the election." *Id.* at 225. Also in *Manufacturer's Packing*, the Fourth Circuit discussed its earlier decision in *Turner's Express, Inc. v. NLRB*, 456 F.2d 289 (4th Cir. 1972), and held that the court:

> did not read *Turner's Express, Inc.*, as establishing a per se rule invalidating an election if there is any evidence of pro-union supervisory activity. 645 F.2d at 225-26.

Accordingly, since the Second Circuit in the instant case *also* eschewed such a *per se* approach, *all* Circuits are in harmony on this issue.

5. In *NLRB v. Klinger Electric Corp.*, 656 F.2d 76 (5th Cir. 1981), the court was heavily influenced by the fact that (unlike here) the union won the election by a wide margin. *Id.* at 85-86. Moreover, in *Klinger* only two of the eight leadpeople (assumed to be supervisors) made "isolated and relatively mild" pro-union comments. *Id.* at 86.

6. In *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148 (5th Cir.), *cert. denied*, 449 U.S. 844 (1980), the Board found (with court approval) that two of the three pro-union persons alleged to be supervisors were, in fact, non-supervisory. Since the single pro-union supervisor merely wore a union button and passively attended one union meeting, the court enforced the Board's Order. *Id.* at 1151-52. It is significant, however, that the court contrasted the facts in that case with those in *NLRB v.*

Lamar Electric Membership Corp., 362 F.2d 505 (5th Cir. 1966). Thus, in *Lamar Electric*, one supervisor made a speech at a union meeting which was *remarkably* similar to the speech given by groupleader Gray in the instant matter. The *San Antonio Portland Cement* court said that in *Lamar Electric*, it concluded that such evidence "made out a prima facie case of supervisory coercion." 611 F.2d at 1152.[26]

7. In *Medical Center at Bowling Green v. NLRB*, 712 F.2d 1091 (6th Cir. 1983), the evidence showed that the supervisors' "participation [on behalf of the union] was minimal." *Id.* at 1094.

8. In *NLRB v. Wehrenberg Theaters, Inc.*, 690 F.2d 159 (8th Cir. 1982), there was no evidence that the supervisor in question "coerced or induced" the signing of union authorization cards. *Id.* at 162.

9. In *Fall River Savings Bank v. NLRB*, 649 F.2d 50 (1st Cir. 1981), the Board found (with court approval) that a number of the persons alleged to be supervisors were in fact, merely rank-and-file employees. *Id.* at 55. Moreover, unlike here, in *Fall River* the employer was not foreclosed from controlling the pro-union activities of its supervisors by a refusal of the Regional Director to decide supervisory issues prior to the election. *Id.* at 56, n.5.

10. The final case cited by Petitioner in support of its "conflict" argument actually supports the *Employer* herein. Thus, in *NLRB v. Howard Johnson Motor Lodge*, 705 F.2d 932 (7th Cir. 1983), the Regional Director denied the employer's request for a hearing on its objections (which alleged pro-union election interference similar to the instant case). Like the Second Circuit in the case at bar, the court in *Howard Johnson* noted that the Board's Order was at odds with its decision in *Flint Motor Inn, supra.*

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[26]The *Lamar Electric* case also involved supervisory threats, but since such threats occurred *after* the election, they clearly could not have impacted upon the results. *See Ideal Elec. & Mfg. Co.*, 134 NLRB 1275 (1961).

Accordingly, the Seventh Circuit remanded the case to the Board with instructions to conduct an evidentiary hearing.

11. Finally, in a collateral proceeding involving this Employer, *ITT Lighting Fixtures, Division of ITT Corp. v. NLRB,* 719 F.2d 851 (6th Cir. 1983), one issue was the supervisory status of groupleader Gray, whom the Board had found was non-supervisory and was transferred in violation of §8(a) (1) of the Act. In denying enforcement to that portion of the Board's Order, the Sixth Circuit found that:

> The Second Circuit [in the instant case] held, *inter alia* that the Board had failed, after two opportunities, to formulate a comprehensive interpretation of the statutory definition of a supervisor.
>
> After perceiving the Board's inconsistency and confusion on this issue in this and the collateral proceedings . . . we also reverse the Board. The decision of the Board [in its Supplemental Decision following remand from the Second Circuit] that Ms. Gray was a supervisor is based on a set of vague and confusing standards which bear little resemblance to the statutory definition. The distinction between "major" and "minor" supervisors, for instance, does not provide any guidance nor is it based on the criteria in the statute. *Id.* at 858.

Accordingly, *two* Courts of Appeals have been called upon to review the Board's decisional process based upon the record below, and *both* have found the Board's Order to be unsupported by substantial evidence. For this reason, rather than a "conflict" in the Circuits regarding this case, there is instead *unanimity,* "and consistency of decisions among the Circuits." 719 F.2d at 858.

II.
These Cases Do Not Present Recurring Questions, Nor Are The Issues Herein Of Unusual Practical Importance

Contrary to the contentions of Petitioner, these cases present no recurring questions, nor do the issues involved rise to the level of "unusual practical importance." Petition, p. 6. Thus, as can be gleaned from the discussion above, it is highly unusual for either the Board or the Courts of Appeals to be confronted with a set of factual circumstances like the one herein. Many of the cases cited by the Union in its Petition involve only minimal and insubstantial pro-union activity by a few isolated supervisors, and the unions involved won the elections by wide margins. Here, however, the vote was *extremely* close, and approximately one-half of the Employer's 31 groupleaders played an open and active pro-union role in the campaign. Indeed, the groupleaders herein constituted forty percent (40%) of the Union's trusted and invaluable organizing committee.

In *no other such case* did the Board so restrict its definition of "major" supervisor as to disregard the supervisors' power to grant or deny rewards. In several of the cases cited by Petitioner, the employer could be (and was) faulted for having failed to control the pro-union activities of its supervisory staff. Here, however, the Regional Director foreclosed the Company from effectively controlling its groupleaders by his initial refusal to decide their supervisory status.

More significantly, in the instant case it was *the Union itself* which capitalized upon and intensified the Employer's dilemma. Thus, the Union's own attorney erroneously advised the groupleaders that they were *not* supervisors, and he encouraged them to continue with their active pro-union support. In no case cited by Petitioner was the union itself so *directly responsible* for the extant supervisory election interference.

Significantly, none of the cases relied upon by the Union in its

Petition involved the Board disregarding specific remand instructions by a court of appeals, as this one did. In no such case were the Board's factual findings internally contradictory as was its Supplemental Decision here. Moreover, of all the cases cited by Petitioner, *none* involved (as here) the Board's contradiction of its own precedent on the issue of the effectiveness of supervisory recommendations.

In sum, since the Court of Appeals herein is in agreement with other circuits that pro-union supervisory conduct is not *per se* grounds to set aside an election, and since (as stated by the Fourth Circuit) "whether pro-union supervisory activity is sufficient to overturn an election depends on the facts and circumstances of each case,"[27] the circumstances of *this* case are extremely *unlikely* to recur.

III.
These Cases Do Not Satisfy The Supreme Court's Standards For Granting Certiorari

As demonstrated above, there is no conflict whatsoever between the decisions of the court below and those of any other circuit. Furthermore, these cases do not present recurring questions, nor are the issues herein of "unusual practical importance" so as to warrant the granting of Certiorari. Rather, as this Court stated in *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951):

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Lane & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). *Id.* at 502.

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[27] *NLRB v. Manufacturer's Packing Co.*, 645 F.2d at 225-26.

In cases of the type presented in the instant Petition:

> The same considerations that should lead us to leave undisturbed, by denying Certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this one is, on other legal issues. *Id.* at 502-03.

Even though the Supreme Court might have decided the matter differently (if it was in the place of the lower court):

> In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543 (1927). *Id.* at 503.

Furthermore, as this Court found in the case of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951):

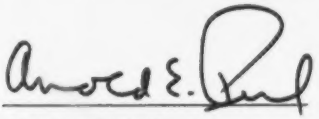
> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. *Id.* at 491.

Clearly, the instant matter is *precisely* the type of situation this Honorable Court had in mind in the two cases cited above, which are the touchstone decisions for determining the scope of review by the Federal judiciary in National Labor Relations Act proceedings.

CONCLUSION

For the foregoing reasons, the Employer submits that the Union's Petition fails to satisfy this Court's criteria for the granting of a Writ of Certiorari. Therefore, the Employer respectfully urges this Honorable Court to deny the Union's Petition.

Respectfully submitted,



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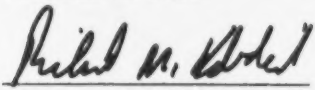

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No. 83-1187

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS, ETC., PETITIONER

v.

ITT LIGHTING FIXTURES, INC., ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner was chosen as bargaining representative by a majority of employees at respondent ITT Lighting Fixtures, Inc.'s facilities in Southaven, Mississippi, and Memphis, Tennessee, in an election conducted under the auspices of the National Labor Relations Board on February 16, 1979. ITT objected to the election results on the ground that the pro-union activity of certain "group leaders" impermissibly interfered with the employees' free choice. The Board rejected that challenge, finding that the group leaders, although supervisors within the meaning of the National Labor Relations Act, had no substantial authority to affect the employment status of other employees and therefore that their activities on behalf of petitioner did not impair the

employees' freedom of choice in the election. Pet. App. 32a-34a.[1]

Petitioner was certified as bargaining representative on May 9, 1980 (Pet. App. 63a-68a). ITT thereafter refused to bargain, and, upon charges filed by petitioner, the Board found that the company had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by its refusal to bargain (Pet. App. 51a-62a). The Board ordered ITT to recognize and bargain with petitioner.

2. The court of appeals refused to enforce the Board's order (Pet. App. 10a-30a). The court found that the Board's Regional Director, whose decision the Board had adopted in the underlying representation proceeding, had failed to make sufficient findings with respect to the precise supervisory authority of the group leaders and had failed to articulate sufficiently the reasoning underlying the conclusion that their pro-union activities did not impair the employees' free choice (*id.* at 22a-30a). The court remanded the case for further findings by the Board.

3. On remand, the Board reaffirmed its earlier decision (Pet. App. 31a-50a). It examined the supervisory authority of those group leaders who engaged in activity on behalf of petitioner[2] and found that they had no independent authority to hire, fire, promote, lay off, reward, discipline, or issue formal warnings to employees. Thirteen of them had the independent authority to assign and direct work; seven had

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[1]The parties stipulated that a number of group leaders engaged in one or more of the following activities: attended union meetings and encouraged other employees to attend; solicited authorization cards and signed cards themselves; wore pro-union T-shirts; spoke out and campaigned for the union; met with the union's international representative; and had dinner with a union representative (Pet. App. 17a-19a).

[2]The Board determined that 15 of 31 group leaders had engaged in some form of pro-union activity (Pet. App. 36a).

the authority to allow employees to leave work early and to approve overtime; and four could adjust grievances. *Id.* at 32a-33a, 48a. The Board concluded on the basis of these findings that the "type of day-to-day supervisory authority possessed by these group leaders simply * * * does not warrant a finding that the retaliatory potential of the group leaders was sufficient to make their involvement in the union campaign coercive to employees" (*id.* at 49a). Further, the Board noted that no supervisor engaged in threats or any other acts "to make any employee fear possible retribution at a group leader's hands for failing to support the Union" (*ibid.* (footnote omitted)). Accordingly, the Board reaffirmed its earlier holding that the activities of the group leaders did not warrant setting aside the election and again ordered the company to bargain.

4. The court of appeals again refused to enforce the Board's order (Pet. App. 1a-9a). The court held that the Board erred by failing to consider, in addition to the power to retaliate, the power of the group leaders to reward employees by giving one employee an advantage over another.[3] The court independently examined the authority of the group leaders and concluded that five of them had the power effectively to recommend favorable or adverse action, and therefore that employees "could possibly have been influenced by the pro-union activity" of the five group leaders (*id.* at 9a). The court vacated the Board's order and set aside the election.

5. While the Board believes that the court of appeals erred in rejecting its finding that the supervisors possessed insufficient authority over the employment status of other employees to make their pro-union involvement coercive, and in setting aside the election, the Board did not file its

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[3]In fact, the Board did find that the group leaders lacked the authority to "reward" employees (Pet. App. 33a).

own petition for certiorari because in its view the disagreement between the Board and the court turns largely on the particular facts of this case. Such a fact-bound issue is not one that this Court ordinarily would review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Petitioner seeks review on the ground that the court of appeals' decision is in conflict with decisions of other circuits over the proper legal standard to be applied in evaluating pro-union activities of supervisors. Petitioner contends (Pet. 6-11) that the Second Circuit holds supervisory pro-union conduct to a higher standard than do other courts of appeals and that it would set aside an election whenever the activities of supervisors could possibly have influenced employee free choice, whereas other courts of appeals would not set aside an election unless the pro-union activity contains express or implied threats of retaliation or promises of benefits. We submit that there is no such conflict.

In evaluating the effect of pro-union conduct by supervisors, the Board and the courts both generally examine all the circumstances, with particular emphasis on (1) the nature of the supervisor's authority and (2) the nature and extent of the pro-union activities. See *Delchamps, Inc.*, 210 N.L.R.B. 179, 180 (1974); *Flint Motor Inn Co., d/b/a Sheraton Motor Inn*, 194 N.L.R.B. 733, 734 (1971). It is generally true, as petitioner suggests, that pro-union conduct by low-level supervisors who lack significant authority to affect employees' working conditions or employment status will not invalidate an election unless the supervisors threaten employees, or promise them future benefits, in an effort to persuade them to support the union. Compare *NLRB* v. *Northeastern University*, 707 F.2d 15, 18 (1st Cir. 1983) (nonthreatening pro-union conduct by low-level supervisors not sufficient to invalidate election) with *NLRB* v. *Howard Johnson Motor Lodge*, 705 F.2d 932, 934-935 (7th

Cir. 1983) (threats by low-level supervisors were coercive of employees' right to choose freely) and *Marconi, Inc.*, 251 N.L.R.B. 46 (1980) (threats by pro-union supervisor warranted setting aside the election). However, the Board has never required the presence of threats or promises of benefit in order to find that supervisory pro-union conduct has impaired employees' free choice and therefore warrants setting aside an election. Where there are pervasive pro-union activities by supervisors who possess significant authority to affect working conditions or employment status, the Board will find such conduct to be coercive of the employees' right to choose a representative, notwithstanding the absence of threats or promises of benefit, if, under the circumstances, employees could reasonably fear or expect some future retaliation or grant of benefit by a pro-union supervisor. See, *e.g., Delchamps, Inc., supra*; *Flint Motor Inn Co., supra*; see also *Glomac Plastics, Inc.*, 194 N.L.R.B. 406, 409-410 (1971).

The cases cited by petitioner (Pet. 7-11) are not to the contrary. The courts in those cases accepted the general principle applied by the Second Circuit here — "an election is not per se invalid merely because there was some pro-union activity on the part of a supervisor. Rather, there must be a showing that the supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election" (Pet. App. 15a-16a). See, *e.g., Fall River Savings Bank* v. *NLRB*, 649 F.2d 50, 56 (1st Cir. 1981); *NLRB* v. *Manufacturers' Packaging Co.*, 645 F.2d 223, 225-226 (4th Cir. 1981).[4] Although the courts in these cases, in sustaining the Board's conclusion that the supervisory conduct at issue

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[4]Petitioner suggests (Pet. 8) that the First Circuit expressly noted a conflict with the Second Circuit in *NLRB* v. *Northeastern University*, 707 F.2d at 18. Earlier in its opinion, however, the *Northeastern* court cited the court's decision in this case with approval for the proposition

was not likely to have a coercive effect, emphasized that the conduct did not involve threats or promises, the courts did not hold that those were the only factors that were relevant to a determination of that question. On the contrary, the courts considered all the circumstances, including the level of supervisory authority, to determine whether the supervisor's activity created the potential for future reprisal that would reasonably be likely to preclude employees from exercising a free choice in the election. See, *e.g.*, *Fall River Savings Bank* v. *NLRB*, 649 F.2d at 57; *NLRB* v. *San Antonio Portland Cement Co.*, 611 F.2d 1148, 1152 n.2 (5th Cir. 1980). Moreover, nearly all the cases cited by petitioner involved the isolated activities of only one or several supervisors, as opposed to the large number of pro-union supervisors involved here. See, *e.g.*, *NLRB* v. *Northeastern University*, 707 F.2d at 18; *NLRB* v. *St. Mary's Home, Inc.*, 690 F.2d 1062, 1069 (4th Cir. 1982); *NLRB* v. *San Antonio Portland Cement Co.*, 611 F.2d at 1151.

Respectfully submitted.

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MARCH 1984

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that an election will be invalid if a " 'supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice.' " 707 F.2d at 17. To the extent the *Northeastern* court contrasted the court's decision in this case with its own, the comparison merely questions the result reached on the particular facts and does not reflect a different legal standard.

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No. 83-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

ITT LIGHTING FIXTURES, INC. DIVISION OF ITT CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF [1]

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[1] Throughout this Reply Brief: "Pet." and "Pet. App." will respectively refer to the Petition for a Writ of Certiorari and appendix thereto; "Bd. Br." will refer to the Memorandum for the National Labor Relations Board; "ITT Br." will refer to the Brief in Opposition filed by respondent ITT.

ARGUMENT

1. Like Little Jack Horner pulling plums out of his Christmas pie, respondent ITT plucks facts out of the appellate decisions cited in the Petition, and states with self-satisfaction that because this or that fact is absent from the present case, there is no conflict among the circuits. (ITT Br. 18-21). If an exact "color-matching of cases"[2] were a precondition for a conflict among the circuits warranting the exercise of this Court's certiorari jurisdiction, few if any cases would qualify. In the final analysis, every case "turns on its own particular facts and circumstances" (ITT Br. 18). But those "facts and circumstances" must be evaluated according to some legal standard, and the outcome will often depend on what standard is chosen. So it is here, and so it was in the conflicting cases cited in the Petition. But precisely because this Court sits to resolve important questions of federal law, the question whether "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter"[3] depends on whether those decisions rest on conflicting rules of federal law. In that sense (which alone is material for present purposes) the decision below does conflict with those relied on at Pet. 7-11, because the latter decisions applied a significantly different legal standard in reviewing Labor Board certifications which were challenged on the ground of pro-union activity by supervisors. ITT cannot obscure its inability even to contend that the result of the present case would have been the same if the Second Circuit had applied the legal standard which prevails in other circuits.

The Labor Board also attempts to paper over the conflict of decisions.[4] The Board asserts that the courts in

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[2] *Cf. Reck v. Pate*, 367 U.S. 433, 442.

[3] U.S. Supreme Court Rule 17.1(a).

[4] Since the Board, though believing the decision below to have been wrong (Bd. Br. 5), has chosen to oppose review thereof, it is

the cases we cited "accepted the general principle applied by the Second Circuit here" (Bd. Br. 5). But the First and Fourth Circuit decisions which the Board cites (*id.*) did *not* accept the Second Circuit's "reasonably tended to have * * * a coercive effect * * *"[5] standard; rather those Courts required a much stronger showing before setting an election aside. See Pet. 7-8 quoting *Fall River Sav. Bank v. N.L.R.B.*, 649 F.2d 50 (C.A. 1) and Pet. 10, quoting *N.L.R.B. v. Manufacturer's Packaging Co., Inc.*, 645 F.2d 223 (C.A. 4).[6]

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fitting to recall what this Court said in rejecting the Board's contention that charging parties (such as the present petitioner) should not be permitted to intervene in enforcement proceedings:

> The Board also argues that the permitting intervention will adversely affect its tactical or budgetary decision not to bring a case here for review. But the opportunity is open to the Board to advise this Court whether a case that the intervening charging party brings here is an appropriate vehicle to raise important issues. And Congress has entrusted to this Court, rather than the Labor Board, discretionary jurisdiction to review cases decided by the Courts of Appeals. [*Auto Workers v. Scofield*, 382 U.S. 205, 221-222]

[5] Pet. Br. 5, quoting Pet. App. 15a.

[6] The Board's effort to pass off a conflict concerning legal standards as something less is exemplified by its denial that the First Circuit in *N.L.R.B. v. Northeastern University*, 707 F.2d 15 expressly noted a conflict with the Second Circuit's initial decision in the present case. (Bd. Br. 5-6, n.4). The pertinent passage in *Northeasern* is as follows:

> We have held, in related circumstances, that "without evidence of any threats, express or implied [the fact that supervisors favor a union] does not compel a finding of coercion." *Fall River Savings Bank v. NLRB*, 649 F.2d at 57. *But compare the Second Circuit's view in ITT Lighting Fixtures v. NLRB*, 658 F.2d [934] at 937. And, that holding governs here. [707 F.2d at 18, emphasis in original.]

Yet, in discussing this "holding" the Board says that "the comparison merely questions the result reached on the particular facts and does not reflect a different legal standard." (Bd. Br. 6, n.4).

We note also that the Board's reliance on a prior reference to *ITT* in the *Northeastern* opinion is misplaced. The court did not

Necessarily conceding that in the cases which we cited the courts "emphasized that the [supervisors'] conduct did not involve threats or promises" (Bd. Br. 6), the Board nevertheless says that these "courts did not hold that those were the only factors that were relevant to a determination of that question [but] considered all the circumstances, including the level of supervisory authority, to determine whether the supervisor's activity created the potential for future reprisal that would reasonably be likely to preclude employees from exercising a free choice in the election." (*Id.*). This, too, is incorrect: The Tenth Circuit, in a decision quoted at Pet. 9, but not cited by the Board, squarely held:

> Where supervisors exhibit pro-union activity and employees are aware of this, the election will be tainted only upon a showing of threats, either expressed or implied, that result in the employees' fear of retaliation. [*Worley Mills, Inc. v. N.L.R.B.*, 685 F.2d 362, 365 (C.A. 10)].

Since the court below set aside the election although there was no "showing of threats, express or implied" there is an unmistakable conflict of decisions between the Tenth and Second Circuits. Moreover, the existence of an intercircuit conflict is confirmed, rather than negated, by the *Fall River* and *San Antonio Portland Cement* cases cited at Bd. Br. 6. For while those decisions did give some weight to the "level of supervisory authority" (although considerably less than to the absence of threats or promises[7]) the Second Circuit here criticized the

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there approve *ITT* or state that it was in accord with the First Circuit's own decisions, but was merely setting forth "Northeastern's main argument." 707 F.2d at 17.

[7] In *Fall River* the Court said, on the page cited by the Board:

> [T]he Board could take into account the relatively limited power of the Managers as well (*far more importantly*) as the absence of threatening conduct, in refusing to set aside the

Board for distinguishing between "major" and "minor" supervisors (Pet. App. 7a), and neither respondent contends that the "more than minimal authority" (Pet. App. 8a) of the supervisors who supported the union here was greater than that of the supervisors in *Fall River*, *San Antonio Portland Cement*, or in any of the other cases which we have cited.[8]

2. While both respondents strain to deny the existence of an intercircuit conflict concerning the legal standard

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election on grounds of coercion. [649 F.2d at 57, emphasis added.]

In *San Antonio Portland Cement*, the Court said in the footnote cited by the Board:

> The Hearing Officer also found that New was a "low-level" supervisor, and that his authority extended only over a very insignificant number of total unit employees. [611 F.2d at 1152, n.2]

[8] Finally, the statement that "*nearly all* the cases cited by petitioner involved the isolated activities of only one or several supervisors, as opposed to the large number of pro-union supervisors involved here" (Bd. Br. 6, emphasis added), is both misleading and irrelevant. While the "large number of supervisors here" apparently refers to "the 15 group leaders whose status as supervisors is conceded" (Pet. App. 8a), only 5 did more than attend union meetings, which the court itself deemed insufficient. (*Id.*) Moreover, the Board's point is irrelevant because the court below did not rely on either the number of supervisors involved or of those who were active; rather, the court focused on the number of unit employees whom they supervised and the size of the union's margin of victory in the election (Pet. App. 9a). In this respect the decision below is apparently unique in assuming an adverse impact on all individuals who are supervised by a union supporter based on the latter's authority to reward them. Thus, for example, in one of the cases cited at Bd. Br. 6, *Northeastern University*, *supra*, the court did not even mention how many unit employees were supervised by the individual whose activities were challenged by the employer; indeed, it appears to have been all of them, since he was "the coordinator of [the] Transportation Department", which was the unit in individual whose activities were challenged by the employer, which the election was held. And the court gave no weight to the union's margin of victory; indeed, because the vote was 6-4, the union would have lost if one vote had changed. See 707 F.2d at 16-17.

for determining when an election should be set aside because of pro-union activity by supervisors, neither so much as mentions the glaring inconsistency between the standard applied by the court below and that which governs anti-union activity by supervisors. See Pet. 12-13. The existence of this double standard for review of election objections cannot be reconciled with § 7 of the National Labor Relations Act, which guarantees in equal terms the right of employees "to bargain collectively through representatives of their own choosing" and "to refrain from * * * such activit[y]."

CONCLUSION

For the foregoing reasons as well as those stated in the Petition for Writ of Certiorari the petition should be granted.

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